

**DOCKET**



No. 88-556-CFX  
Status: GRANTED

Title: Browning-Ferris Industries of Vermont, Inc., et al.,  
Petitioners  
v.  
Kelco Disposal, Inc. et al.

Docketed:

September 30, 1988 Court: United States Court of Appeals  
for the Second Circuit

Counsel for petitioner: McGrath, J. Paul, Frey, Andrew L.

Counsel for respondent: Hemley, Robert B., Spivack, Gordon,  
Farr III, H. Bartow, Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 12 1988	G	Application (A88-132) to extend the time to file a petition for a writ of certiorari from August 30, 1988 to October 14, 1988, submitted to Justice Marshall.
2	Aug 18 1988		Application (A88-132) granted by Justice Marshall extending the time to file until October 1, 1988.
3	Sep 30 1988	G	Petition for writ of certiorari filed.
4	Oct 25 1988		Brief of respondents in opposition filed.
5	Oct 26 1988		DISTRIBUTED. November 10, 1988
6	Nov 1 1988	X	Reply brief of petitioner Browning-Ferris filed.
7	Nov 1 1988	G	Motion of Motor Vehicle Manufacturers Association of the United States et al. for leave to file a brief as amici curiae filed.
8	Nov 14 1988		Motion of Motor Vehicle Manufacturers Association of the United States et al. for leave to file a brief as amici curiae GRANTED.
9	Nov 16 1988		REDISTRIBUTED. December 2, 1988
10	Dec 5 1988		Petition GRANTED. limited to Question 2 presented by the petition. *****
11	Jan 19 1989		Brief amici curiae of Johnson & Higgins, et al. filed.
12	Jan 19 1989		Brief amici curiae of Merrill Lynch, et al. filed.
13	Jan 19 1989		Brief amici curiae of Arthur Andersen & Co., et al. filed.
14	Jan 19 1989		Brief amici curiae of American National Red Cross, et al. filed.
15	Jan 19 1989		Brief amicus curiae of City of New York filed.
16	Jan 19 1989		Brief amici curiae of CBS, Inc., et al. filed.
17	Jan 19 1989		Brief amicus curiae of National Assn. of Mutual Insurance Companies filed.
18	Jan 19 1989		Brief amicus curiae of Navistar International Transportation Corp. filed.
19	Jan 19 1989		Brief amici curiae of Bethlehem Steel Corp., et al. filed.
20	Jan 19 1989		Brief amici curiae of Alliance of American Insurers, et al. filed.
21	Jan 19 1989	G	Motion of Metromedia, Inc. for leave to file a brief as amicus curiae filed.
22	Jan 19 1989		Brief amici curiae of Pharmaceutical Manufacturers Assn, et al. filed.
23	Jan 19 1989		Brief amici curiae of Golden Rule Insurance Co., et al. filed.
24	Jan 19 1989		Joint appendix filed.

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Entry	Date	Note	Proceedings and Orders
27	Jan 19 1989		Brief amici curiae of United States Chamber of Commerce, et al. filed.
28	Jan 19 1989	G	Motion of Goodyear Tire and Rubber Company for leave to file a brief as amicus curiae filed.
25	Jan 25 1989		Brief of petitioners Browning-Ferris Industries, et al. filed.
29	Jan 26 1989		Brief of respondents in response to the motions of the Goodyear Tire and Metromedia for leave to file briefs as amici curiae filed.
31	Feb 8 1989		Order extending time to file brief of respondent on the merits until March 1, 1989.
34	Feb 17 1989		Brief amicus curiae of Insurance Consumer Action Network filed.
35	Feb 17 1989		Brief amicus curiae of California Trial Lawyers Assn. filed.
32	Feb 21 1989		Motion of Metromedia, Inc. for leave to file a brief as amicus curiae GRANTED.
33	Feb 21 1989		Motion of Goodyear Tire and Rubber Company for leave to file a brief as amicus curiae GRANTED.
36	Feb 21 1989		Record filed.
		*	Certified copy of original record and proceedings, 2 boxes, received.
37	Feb 24 1989		Brief amicus curiae of Martha Hoffman Sanders filed.
38	Feb 28 1989		Brief amici curiae of Consumers Union of U.S., et al. filed.
39	Mar 1 1989		Brief of respondents filed.
40	Mar 1 1989		Brief amicus curiae of Association of Trial Lawyers of America filed.
42	Mar 1 1989		Brief amicus curiae of Illinois Trial Lawyers Assn. filed.
41	Mar 8 1989		SET FOR ARGUMENT, APRIL 18, 1989. (1st CASE)
43	Mar 15 1989		CIRCULATED.
44	Mar 31 1989	X	Reply brief of petitioners Browning-Ferris, et al. filed.
45	Apr 18 1989		ARGUED.

**PETITION  
FOR WRIT OF  
CERTIORARI**

88-556

1

Supreme Court, U.S.

FILED

SEP 30 1988

JOSEPH E. SPANGL, JR.  
CLERK

No.

**In the Supreme Court of the United States**

OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., AND  
BROWNING-FERRIS INDUSTRIES, INC., PETITIONERS

v.

KELCO DISPOSAL, INC., AND JOSEPH KELLEY, RESPONDENTS

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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### QUESTIONS PRESENTED

Petitioner BFI and respondent Kelco were the sole competitors in the roll-off waste collection market in Burlington, Vermont. For approximately six months, BFI cut its prices to a portion of the customers in the market. BFI was unable to increase its market share, however, and it soon thereafter sold its business in Burlington and withdrew from the market. Kelco sued BFI claiming injury from predatory pricing, in violation of the federal antitrust laws, and a parallel Vermont tort. The jury found for Kelco on both counts, awarding \$51,146 in compensatory damages and \$6,000,000 in punitive damages.

The following questions are presented:

1. Whether the court of appeals adopted an erroneous test for determining if a plaintiff's proof satisfies the "dangerous probability of success" element of a predatory pricing claim by
  - a. allowing the plaintiff to prevail without showing that the alleged predatory pricing was likely to drive the defendant's existing competitors from the market, and
  - b. permitting the plaintiff to proffer a market's low rate of return on investment under competitive conditions as proof that new entrants would be reluctant to enter the market under monopoly conditions.
2. Whether an award of \$6,000,000 in punitive damages, amounting to more than 100 times the plaintiff's actual damages from a purely economic tort, is excessive under the Eighth Amendment or otherwise.



## RULE 28.1 STATEMENT

Pursuant to Rule 28.1 of the Rules of this Court, petitioner Browning-Ferris Industries of Vermont, Inc., states that its parent company is Browning-Ferris Industries, Inc.; petitioner Browning-Ferris Industries, Inc., states that its only other affiliate or subsidiary (other than wholly-owned subsidiaries) is American Ref-fuel Company, a joint marketing effort with Air Products and Chemicals, Inc.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., AND  
BROWNING-FERRIS INDUSTRIES, INC., PETITIONERS

v.

KELCO DISPOSAL, INC., AND JOSEPH KELLEY, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Browning-Ferris Industries of Vermont, Inc., and Browning-Ferris Industries, Inc. (collectively "BFI"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 845 F.2d 404. The opinion and order of the district court (App., *infra*, 15a-27a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1988. A timely petition for rehearing was denied on June 1, 1988 (App., *infra*, 28a). On August 18, 1988, Justice Marshall issued an order extending the time for filing a petition for a writ of certiorari to and including October 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Excessive Fines Clause of the Eighth Amendment provides:

[N]or [shall] excessive fines [be] imposed \* \* \* \*.

2. Section 2 of the Sherman Act (15 U.S.C. § 2) provides, in pertinent part:

Every person who shall \* \* \* attempt to monopolize \* \* \* shall be deemed guilty of a felony \* \* \* \*.

3. Section 4(a) of the Clayton Act (15 U.S.C. § 15) provides, in pertinent part:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue \* \* \* and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

## STATEMENT

1. This case grew out of competition in the commercial and industrial "roll-off" waste collection business in the greater Burlington, Vermont area during the early 1980s. Roll-off containers typically handle waste from manufacturing plants and construction sites. Construed in the light most favorable to respondents, the evidence adduced at trial showed the following.

Petitioner BFI operates a nationwide commercial and industrial waste collection business. C.A. App. 752-753, 1284-1285. BFI entered the Burlington area trash collection market in 1973, when it hired respondent Joseph Kelley as its district manager and outfitted him with a front-end loader truck, used for hauling relatively small loads of trash. BFI provided these services in competition with a number of local companies. In 1976, BFI expanded its Burlington operations and began to offer roll-off collection services. It remained the sole provider of roll-off services in the Burlington area until 1980,

when Kelley quit BFI and started his own waste disposal company, respondent Kelco Disposal, Inc. Kelley invested \$75,000 to buy the equipment needed to provide roll-off collection services and began to solicit roll-off customers. App., *infra*, 2a-3a; C.A. App. 436, 465-70, 478-482, 484-485, 615, 639-640, 757, 919.

Kelco's sales strategy was to undercut BFI's prices. C.A. App. 107, 135, 222. That strategy proved extremely successful. In fiscal year 1981, its first full year of operations, Kelco gained a market share of approximately 38%; that figure rose to 43% the following year. C.A. App. 1218. In the fall of 1982, Kelley told a BFI employee that he planned to drive BFI out of business. C.A. App. 127, 791.<sup>1</sup>

BFI employees responded to Kelco's success with an equally strong competitive spirit. When, during a bar-room conversation, a BFI regional executive was told of Kelley's threat, he told his district manager in colorful language that he should drive Kelco out of business. App., *infra*, 2a-3a, C.A. App. 108, 120-121, 139-140, 166, 183-184, 224-226.<sup>2</sup> For six months in late 1982 and early 1983, BFI attempted to meet Kelco's competitive challenge by offering low prices to selected customers totaling approximately one-sixth of the Burlington roll-off market. C.A. App. 108, 226, 234, 289, 317.<sup>3</sup> Soon after BFI began to offer the more competitive prices, Kelco's attorneys wrote a letter to BFI stating that BFI's pricing strategy "violate[d] state and federal pricing laws. Unless [BFI] ceases to compete unfairly with

<sup>1</sup> In mid-1982, the parties discussed the possible purchase of Kelco by BFI but were not able to agree upon a price. C.A. App. 107, 441-443, 501-504, 781-786.

<sup>2</sup> See also C.A. App. 533 (testimony regarding similar statement made by the same executive on the same occasion). The executive denied making these statements. C.A. App. 791-793.

<sup>3</sup> Although the low prices were offered only for a six-month period, some agreements reached during that time extended the low prices into 1984. App., *infra*, 3a.

Kelco immediately, we will initiate legal proceedings on behalf of Kelco." C.A. App. 1287.

If the intent of BFI's new pricing strategy was to drive Kelco from the market, it was not successful. Despite the low prices for some customers, BFI actually improved the profitability of its Burlington operations (C.A. App. 1222-1224); but it was unable to increase its market share against Kelco. Indeed, Kelco *gained* revenues and *increased* its reported operating profit during the period that BFI offered low prices. Kelco was able to add new customers and increase the prices that it charged some of its existing customers. C.A. App. 499-501, 1256-1273.<sup>4</sup> After BFI abandoned its six-month venture into vigorous price competition, Kelco's market share continued to rise. By 1985, Kelco served 55.7% of the market. BFI then sold its business and left town. C.A. App. 506, 794-795, 1218.

2. In June 1984, Kelco commenced this action in the United States District Court for the District of Vermont alleging that BFI had engaged in unlawful predatory pricing. Kelco sought damages on the ground that the alleged predatory pricing strategy constituted attempted monopolization, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and tortious interference with business relations under Vermont law.

<sup>4</sup> The revenues for BFI and Kelco (on a fiscal-year basis) were as follows:

	1981	1982	1983	1984	1985
BFI	\$207,679	\$215,053	\$240,385	\$266,249	\$230,060
Kelco	\$124,898	\$160,184	\$195,486	\$216,957	\$288,694

These gross revenues translate into the following market shares:

	1981	1982	1983	1984	1985
BFI	62.4%	57.3%	55.2%	55.2%	44.3%
Kelco	37.6%	42.7%	44.8%	44.8%	55.7%

C.A. App. 1217-1218.

Separate trials were held on the issues of liability and damages. Much of the evidence at the liability trial related to BFI's costs. BFI's internal accounting records segregated the total cost of providing roll-off services into fixed costs (those that do not vary with changes in output) and variable costs (those that do). According to those records, (1) revenues from the Burlington roll-off operation always exceeded the variable cost of providing that service, and (2) all of BFI's prices, including those alleged by Kelco to have been predatory, always remained above BFI's average variable cost of providing roll-off collection services. BFI's expert accounting witness testified that BFI's records correctly characterized the relevant costs. C.A. App. 866-872, 874-876, 881-882, 1221-1225.

As might be expected, Kelco produced its own expert, who testified that BFI's accounting records erroneously classified the costs involved in the provision of roll-off services. He stated that all of BFI's costs were in fact variable and that BFI's low prices were therefore less than its average variable cost of providing roll-off services. C.A. App. 303-304, 307-311.

Evidence also was introduced concerning the amount of capital that a company would need to enter the roll-off services market in Burlington. Kelley testified that Kelco was started with a \$75,000 capital investment. C.A. App. 436-437. Another witness testified that used equipment could be obtained for less than \$100,000. C.A. App. 646-648. A third witness stated that a total of \$300,000 would be needed to enter the market. C.A. App. 406.

The district court instructed the jury that Kelco could prevail on its attempted monopolization claim only if it proved that BFI had engaged in predatory pricing. The court directed the jury to calculate BFI's average variable cost and stated that "[i]f [BFI's] prices were below that cost, you may presume that [BFI] engaged in pred-



atory pricing. In other words that their conduct was illegal. And the burden shifts to [BFI] to convince you that their pricing was not illegal and that other economic factors justified their choice of prices" (C.A. App. 984). The court also instructed that Kelco was required to show that "there was a dangerous probability that [BFI] would succeed in establishing monopoly power in this market" (C.A. App. 984-985). The jury was told that essentially the same inquiry would govern the state tort claim (C.A. App. 990). It returned a verdict in favor of Kelco on both counts.

3. Following the verdict on liability, the trial was continued on the damages issues. Evidence was introduced regarding revenues and profits lost by Kelco to BFI's low prices. In his closing argument on punitive damages (the relevant portions of which are reproduced at App., *infra*, 29a-35a), Kelco's counsel repeatedly stressed the need for the jury to "send a message back to Houston [BFI's headquarters]" (*id.* at 30a; see also *id.* at 32a, 33a, 34a) so that in the future BFI would not disregard letters from competitors complaining about its low prices (*id.* at 32a-33a, 34a). He argued that this could not be done unless the jury based its award on BFI's gross annual income of \$1.3 billion; if the jury would return a \$1,000 verdict against a defendant with \$20,000 annual income, "that would be equivalent to a \$65 million fine on BFI" (*id.* at 34a).

The district court instructed the jury that it could award punitive damages on the tort claim. The jury was told that "[i]n determining the amount of punitive damages, if any, you may take into account the character of the defendants, their financial standing, and the nature of their acts." C.A. App. 1180. The jury awarded damages of \$51,146 on the antitrust claim. With respect to the tort claim, the jury awarded compensatory damages in the identical amount of \$51,146, interest in the amount of \$14,936.74, and punitive damages of \$6,000,000.00. C.A. App. 1197.

4. The district court denied BFI's motion for judgment n.o.v. or a new trial (App., *infra*, 15a-25a). The court concluded that the jury could reasonably have found that BFI's prices were below its average variable cost because the jury could properly have credited the testimony of Kelco's expert witness (*id.* at 19a). Turning to BFI's argument that "the jury's verdict should be overturned because [BFI] had no motive to engage in predatory pricing as [it] could not have recovered [its] losses," the court stated that "whether [BFI] had a motive or not does not change the fact that a reasonable jury could have found that [BFI] engaged in this anti-competitive conduct" (*id.* at 21a). Finally, the court concluded that there was sufficient evidence for the jury to find that the roll-off market was not easy to enter and that "there was a dangerous probability that BFI would monopolize the market if its predatory conduct succeeded" (*id.* at 22a).

The district court also refused to order a remittitur of the punitive damages award. It stated that "[t]he jury could have arrived at this figure as a reasonable punitive measure against a large company practicing predatory conduct towards a smaller one using the criteria given to it by this Court in its charge." App., *infra*, 24a. The court ordered Kelco to elect between the alternative federal antitrust and state tort awards following the completion of appellate review. *Id.* at 26a.

5. The court of appeals affirmed on both the Sherman Act and state tort counts (App., *infra*, 1a-14a). With respect to each, it assessed the jury's finding of liability by applying the standard governing claims of attempted monopolization under Section 2 of the Sherman Act (App., *infra*, 5a). The court first rejected BFI's contention that Kelco failed to show that BFI had engaged in below-cost pricing. Holding that "[t]he characterization of reasonably disputed costs is a question of fact for the jury," the court concluded that the jury could

reasonably have adopted the characterization of BFI's cost of depreciation propounded by Kelco's expert and, therefore, could have found that BFI engaged in predatory pricing (*id.* at 6a-7a).

The court of appeals also considered whether sufficient evidence supported the jury's determination that there was a dangerous probability that BFI would successfully monopolize the market. The court stated that "the jury could have found that barriers to entry were \* \* \* not at all low" because only two companies had entered the market in 11 years and evidence was introduced indicating that the cost of entering the market was more than \$300,000. Calculating that a firm that controlled half of the market and had a 10% return on revenues would realize only \$22,000 in profits, the court remarked that a potential entrant was unlikely to make a \$300,000 investment in such a market (*id.* at 7a-8a). In addition, the court observed that the market was "not unduly competitive," that consumer demand was inelastic, that BFI had a "significant market share," and that the evidence established BFI's subjective intent to drive Kelco from the market (*id.* at 8a-9a).

Turning to BFI's challenge to the \$6 million punitive damages award, the court noted that such awards were committed under Vermont law to the "enormous discretion" of the jury and would be overturned only if manifestly and grossly excessive. App., *infra*, 10a. The court refused to disturb the verdict in this case, observing that the punitive damages award "amount[ed] to less than .5% of BFI's revenues, approximately .6% of its net worth, and less than 5% of its net income, for fiscal year 1986," and that the amount awarded was "not inconsistent" with punitive damages assessments upheld against large corporations in other jurisdictions (*id.* at 11a).

The court of appeals therefore rejected BFI's claim that the award violated the Eighth Amendment's prohibition against excessive fines. "Even if the eighth

amendment does apply to this nominally civil case," the court stated, "we do not think the damages here were so disproportionate as to be cruel, unusual, or constitutionally excessive." App., *infra*, 12a.

#### REASONS FOR GRANTING THE PETITION

This Court has repeatedly recognized that predatory pricing claims must be viewed with suspicion and assessed with great care, because charges of predation may simply mask efforts by competitors to avoid price competition. As a result, the Court has admonished lower courts not to formulate tests for predatory pricing that have little economic basis or that would discourage businessmen from engaging in the very conduct—price competition—that the antitrust laws are meant to foster.

The court of appeals' decision in this case violates those principles in two dramatic respects. First, the court below has announced rules for proof of predatory pricing claims so lax as to create a "dangerous probability" that the goals of the antitrust laws will be subverted. Indeed, the court upheld findings that BFI engaged in predatory pricing *even though Kelco's revenues, reported profits, and market share all remained steady or increased during the relevant period, and it was BFI that ended up withdrawing from the market.* And to make matters worse, the court of appeals held that BFI's price-cutting justified an award of \$6 million in punitive damages—more than 100 times respondent's actual damages. Without question, a judgment of that magnitude will make honest businessmen think twice about cutting prices in the face of complaints by competitors.

It is essential that this Court grant further review. The court of appeals' construction of the antitrust laws, by providing a roadmap for easy proof of predatory pricing claims, is flatly inconsistent with the teachings of this Court and other circuits and with the overwhelming weight of academic commentary. And the court's cavalier



approach to the massive award of punitive damages raises important and unresolved issues about the constitutionality of such standardless deprivations of property—issues that this Court twice recently deemed worthy of its consideration but failed to resolve.

**I. THE COURT OF APPEALS HAS ANNOUNCED A TEST FOR PREDATORY PRICING CLAIMS THAT IS ERRONEOUS AND CONTRARY TO THE TEACHINGS OF THIS COURT.**

Courts must use great care in formulating standards governing liability under the antitrust laws in cases where, as here, the alleged anticompetitive conduct resembles ordinary and proper business practices. If the rules too readily snare legitimate behavior in the antitrust net, businessmen will be reluctant to engage in the vigorous competition that is the goal of the antitrust laws, for fear that they might thereby subject themselves to damages liability.

Recognizing that danger, this Court has intervened several times in recent years to correct legal standards adopted by lower courts that were unduly liberal in permitting the imposition of antitrust liability on the basis of evidence that did not sufficiently eliminate the possibility that defendants were engaged in legitimate competition. See, e.g., *Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S. Ct. 1515, 1527 (1988) (refusing to adopt per se rule because it would discourage conduct beneficial to consumers); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1360-1361 (1986) (fact-finder could not infer the existence of an antitrust conspiracy where the defendants had no plausible economic motive to enter into a conspiracy to charge low prices); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-764 (1984) (conduct that is as consistent with permissible competition as with illegal conspiracy cannot support an inference of conspiracy).

The danger that an overbroad standard of antitrust liability will chill competitive behavior is perhaps great-

est in the context of predatory pricing claims. Predatory pricing is “pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.” *Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 S. Ct. 484, 493 (1986). But “the mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition” (*id.* at 495 n.17). Thus, “a rule of law that prevents a firm from unilaterally cutting its prices risks interference with one of the Sherman Act’s most basic objectives: the low price levels that one would find in well-functioning competitive markets.” *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231 (1st Cir. 1983); see also *Cargill*, 107 S. Ct. at 495 n.17 (citation omitted) (“‘cutting prices in order to increase business often is the very essence of competition . . . [and] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect’”).

As a matter of economic reality, predatory pricing is extremely rare. This Court has observed that “the obstacles to the successful execution of a strategy of predation are manifold, and \* \* \* the disincentives to engage in such a strategy are accordingly numerous. As [the Court] stated in *Matsushita*, ‘predatory pricing schemes are rarely tried, and even more rarely successful.’” *Cargill*, 107 S. Ct. at 495 n.17 (citations omitted) (quoting *Matsushita*, 106 S. Ct. at 1357); see, e.g., R. Bork, *The Antitrust Paradox* 149-154 (1978); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 699 (1975). A businessman who cuts prices is usually engaged in legitimate competition, not predatory pricing; it is therefore essential that the standard used to identify unlawful conduct not allow permissible price competition to be labeled an antitrust violation or made vulnerable to threats of antitrust litigation by disgruntled competitors.

Despite this Court's injunction that predatory pricing claims "must \* \* \* be evaluated with care" (*Cargill*, 107 S. Ct. at 495 n.17), the court of appeals paid no heed to the foregoing considerations. BFI's pricing conduct—responding to Kelco's low prices with price cuts to selected customers for a relatively brief period of time—bears no resemblance to the sustained campaign to eliminate competitors that is an indispensable element of any predatory pricing strategy. See pages 12-13, *infra*. The court of appeals nonetheless found that BFI had violated the antitrust laws, and it did so by formulating a predatory pricing test likely to result in the widespread chilling of legitimate price competition warned against in *Cargill*. The Court should act in this case, as it did in *Matsushita* and *Monsanto*, to eliminate the threat to competition posed by this deeply flawed antitrust standard.

**A. The Court Of Appeals Erred By Permitting A Finding Of Unlawful Predatory Pricing Without Proof That The Defendant's Pricing Behavior Could Have Resulted In The Acquisition Of Monopoly Power.**

1. The court of appeals acknowledged that, in order to prevail on its attempted monopolization claim, Kelco was required to show that BFI's predatory pricing strategy had a "dangerous probability" of success. App., *infra*, 5a; see also *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965).<sup>5</sup> The probability-of-success inquiry has two parts. There must be proof that the defendant can (1) "successfully neutraliz[e] the competition," and (2) "maintain[] monopoly power for long enough both to recoup [his] losses and to harvest some additional gain" (*Matsushita*, 106 S. Ct. at 1357 (emphasis in original)). "Absent some assurance that the hoped-for monopoly will materialize, and that it can be sustained for a significant period of time, '[t]he predator must make a substantial

<sup>5</sup> Kelco also had to show that BFI had a specific intent to monopolize the relevant market (see App., *infra*, 5a).

investment with no assurance that it will pay off.'" *Ibid.* (citation omitted; emphasis in original); see also *Cargill*, 107 S. Ct. at 495 n.17; *Barry Wright Corp.*, 724 F.2d at 231.<sup>6</sup>

Both ingredients are indispensable in proving that a defendant's pricing behavior should give rise to antitrust liability. The fact that a market is susceptible to the maintenance of a monopoly is beside the point if there is no likelihood that the defendant's alleged misconduct would succeed in eliminating existing competitors and acquiring monopoly power in the first place. By the same token, a campaign of predation that might harm some existing rivals is of little moment where ease of entry would prevent the defendant from retaining monopoly power.

The court of appeals committed fundamental errors with respect to both aspects of the probability-of-success inquiry. First, and most critically, the court found it unnecessary to consider whether BFI's conduct was likely to result in a monopoly. Although this Court's decisions in *Cargill* and *Matsushita* point out the importance of this facet of the probability-of-success inquiry, and BFI's briefs focused on this question (see Opening Br. 16-18; Reply Br. 4-6), the court of appeals completely ignored the issue.<sup>7</sup>

If the court of appeals had bothered to examine the matter, it would have been compelled to conclude that Kelco's claim was defective because BFI's pricing be-

<sup>6</sup> Commentators agree that below-cost prices can injure competition only if they are likely to result in the acquisition of monopoly power. See R. Bork, at 149, 153-154; P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 711.2a (1987 Supp.); R. Posner, *Antitrust Law* 191 (1976); Easterbrook, *Predatory Strategies & Counterstrategies*, 48 U. Chi. L. Rev. 263, 267 (1981); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213, 244 (1979).

<sup>7</sup> Remarkably, the court of appeals did not analyze this Court's recent decisions in *Matsushita* and *Cargill*.



havior could not have led to the successful acquisition of monopoly power. Offering low prices to approximately one-sixth of a market for a period of six months could not drive a competitor out of a market where (1) its market share is above 40%, and (2) there are no special circumstances that prevent it from competing for all business in the market. Here, the duration of the allegedly predatory conduct was too short to drive Kelco—which was well entrenched in the market—out of business. And the fact that the low prices were offered to only a small part of the market meant that Kelco had a fair chance of retaining its considerable share of the accounts in the market. That customer base would have enabled Kelco to withstand the loss of the customers to whom BFI offered low prices.<sup>8</sup>

The rule adopted by the court of appeals erroneously allows a predatory pricing claim to be made out by consideration of prices in only a part of a market. But, as other courts of appeals have recognized in analogous contexts, below-cost prices cannot injure competition when they are focused in a limited segment of a relatively homogeneous market. *Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253, 1256 (5th Cir. 1988); *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 305 (5th Cir.), cert. denied, 469 U.S. 833 (1984); *Janich Bros. v. American Distilling Co.*, 570

<sup>8</sup> Additional support for this conclusion can be found in the actual results of BFI's conduct, to which the court of appeals gave no consideration. This Court found in *Matsushita* that the defendants' prospects of attaining monopoly power were "slight" in view of the fact that, while the alleged predatory plan was underway, the market share held by the defendants' two largest competitors did not decline. 106 S. Ct. at 1358-1359; cf. *United States v. General Dynamics Corp.*, 415 U.S. 486, 506 (1974) (approving consideration of post-acquisition evidence in determining whether merger lessened competition in violation of Section 7 of the Clayton Act). So here, Kelco's stable market share and increased revenues during the time of BFI's alleged predation (see note 4, *supra*) demonstrate that there was no "dangerous probability" that BFI's actions could have given it monopoly power.

F.2d 848, 857 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978); see also *International Telephone & Telegraph Co.*, 104 F.T.C. 280, 404 (1984) (prices below average variable cost are not unlawful unless they are maintained for a period "sufficiently long to make it likely that sales at prices below average variable cost could in fact force equally efficient firms to exit").

2. By fashioning a predatory pricing test that relieves plaintiffs of the burden of showing an actual danger of monopolization, the court of appeals has greatly increased the risk that legitimate price cutting posing no danger to competition will erroneously be branded as unlawful. This Court has emphasized that "Congress authorized Sherman Act scrutiny of single firms *only* when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-768 (1984) (emphasis added); see also *Cargill*, 107 S. Ct. at 494 n.15 (prices should not be labeled predatory where "the alleged predator is incapable of successfully pursuing a predatory scheme"). The evidence relied upon by the court of appeals, by contrast, provides little assistance in distinguishing predatory conduct from legitimate competitive behavior.

The court of appeals appears to have been unduly influenced by what it labeled "intent" evidence: the "tough talk" by BFI employees to the effect that they hoped to drive Kelco out of business. See App., *infra*, 7a, 8a. But this evidence is hopelessly ambiguous, because a desire to beat the competition, even when stated in very strong terms, is as consistent with legitimate competition as it is with anticompetitive conduct. As other courts have understood, such evidence is accordingly of virtually no assistance in separating legitimate price-cutting from predatory pricing. See, e.g., *Olympia Equipment Leasing Co. v. Western Union Telegraph*, 797 F.2d 370, 379-380 (7th Cir. 1986), cert. denied, 107

S. Ct. 1574 (1987); *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 887 (5th Cir. 1984); *Barry Wright Corp.*, 724 F.2d at 232; P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 714.2c (1987 Supp.).

Price/cost evidence is equally unreliable. Even dependable evidence that the defendant's prices were below its average variable cost is ambiguous: such evidence might reveal the presence of unlawful conduct, but it might instead indicate that the defendant engaged in legitimate competition through, for example, promotional pricing.<sup>9</sup> Moreover, undue reliance on jury resolution of cost evidence provides insufficient protection of desirable competitive behavior. The defendant's costs may be difficult to ascertain. And even if the relevant costs can be identified, characterizing a particular cost as fixed or variable and allocating joint costs among more than one product are very complex matters. See, e.g., P. Areeda & H. Hovenkamp, ¶ 715.2a ("[t]he difficulties of measuring costs are notorious").<sup>10</sup> As in the present case, conflicting expert testimony is likely to be put before the jury with little judicial guidance.

The upshot is that a jury may well find below-cost pricing even where that characterization is debatable or incorrect. This is especially true where, as in the present

<sup>9</sup> See *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48 (2d Cir. 1979); P. Areeda & H. Hovenkamp, ¶ 716'; see generally *Northeastern Telephone Co. v. AT&T*, 651 F.2d 76, 91 n.24 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 n.6 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977) ("[t]here may be nonpredatory and acceptable business reasons" for pricing below average variable cost).

<sup>10</sup> Indeed, this case itself provides an illustration of the vagaries of cost analysis. During the liability trial, Kelco argued that virtually all of BFI's costs of providing roll-off services varied with output. During the damages portion of the trial, Kelco argued that its own costs would not have increased significantly if its business expanded to serve the customers that had accepted BFI's low prices and that there was no need to take account of cost increases in calculating the damages due to Kelco. C.A. App. 1140-1141.

case, the good faith allocation of costs in the defendant's internal accounting records is not given any extra weight by the jury, and the plaintiff's expert is permitted to label as variable costs several expenses that the defendant had classified as fixed. Then, under the court of appeals' analysis, that fact finding must be reviewed with great deference. In the context of a predatory pricing case, this scheme produces unacceptable risks that vigorous competition will be chilled. See, e.g., R. Bork, at 154; Easterbrook, *Predatory Strategies & Counterstrategies*, 48 U. Chi. L. Rev. 263, 334 (1981).

3. The decision below, rendered by the country's most important commercial circuit, creates considerable confusion about the proper standard for evaluating dangerous probability of success in attempted monopolization cases in general and predatory pricing cases in particular. Its lax approach conflicts with this Court's decisions in *Matsushita* and *Cargill*. It is also inconsistent with decisions of other courts of appeals denying recovery to antitrust plaintiffs that failed to show that the defendant's conduct was likely to result in the acquisition of monopoly power. See *National Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020, 1025 (8th Cir. 1985); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826-827 (6th Cir. 1982); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 271 (7th Cir. 1981), cert. denied, 455 U.S. 921 (1982).

The adverse impact of the court of appeals' decision is not restricted to the judicial arena. The court's error creates a "dangerous probability" that competitive pricing will decrease across the country. If a businessman inquires about the risk that price cutting might result in unjustified antitrust liability, any competent attorney must respond that the possibility of error is considerably greater under the truncated standard adopted by the court of appeals. As a result, businessmen undoubtedly will be reluctant to engage in hard price competition for fear that their reward will not be success in the marketplace, but liability for treble damages (or, as we discuss



in connection with the punitive damages award, far worse). The court of appeals' test for predatory pricing thus perversely transforms the antitrust laws into a weapon against *lawful* price cutting.

Moreover, the decision below provides a blueprint for a company that wants to protect itself against price competition. It need only do precisely what Kelco did here: send a letter to the competitor threatening to bring a predatory pricing claim. Indeed, Kelco urged the jury to rule in its favor so that letters to competitors, such as the one Kelco sent to BFI, will in the future have this exact result (C.A. App. 1149). Price cutting should be prohibited only when it improperly threatens to injure competition, not because a particular competitor would prefer to soften the rigors of a competitive market.

This Court recognized that the decision of the court of appeals in *Matsushita* posed a danger to competition because it permitted the imposition of antitrust liability for conduct that was perfectly consistent with legitimate competition. The predatory pricing standard adopted by the court of appeals in the present case poses precisely the same danger and, for that reason, should be reviewed by this Court.

**B. The Court Of Appeals Employed A Flawed Standard To Assess BFI's Ability To Retain Monopoly Power.**

The court of appeals did consider the second part of the probability-of-success test—whether the market structure was hospitable to the maintenance of monopoly power—but it made several significant legal errors in applying that aspect of the test in this case. It found a dangerous probability that BFI could retain monopoly power principally because “the jury could have found that barriers to entry were \* \* \* not at all low.” App., *infra*, 7a. This determination was based solely on the conclusion that a low return on investment, calculated without regard to the attractiveness of supracompetitive prices, would deter prospective entrants.

Barriers to market entry must be examined in assessing a predatory pricing claim because “without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time” and the predator would be unable to recoup his losses (*Matsushita*, 106 S. Ct. at 1359 n.15). But in determining whether entry barriers exist, a court should look not, as the court of appeals did (App., *infra*, 7a-8a), to market conditions while prices are at *competitive* levels, but rather to conditions after the elimination of existing competition, “because at that point the remaining firms would begin to charge supracompetitive prices, and the barriers that existed during competitive conditions might well prove insignificant” (*Cargill*, 107 S. Ct. at 494 n.15).

This Court in *Cargill* rejected a finding, virtually identical to that relied on here, that a barrier to entry existed because of the low profit margin that new entrants could expect under competitive conditions. The Court held that “this finding speaks neither to the likelihood of entry during a period of supracompetitive profitability nor to the potential return on investment in such a period” (107 S. Ct. at 494-495 n.15). In light of the proliferation of predatory pricing claims that is bound to follow in the wake of the decision below, resolution of the inconsistency between that decision and *Cargill* is especially important.

Here too, the court of appeals' analysis permits the imposition of antitrust liability on businessmen whose only offense is engaging in legitimate price competition. By measuring barriers to entry with data from a competitive market—when entry is almost always less attractive than it would be under monopoly conditions—the court has adopted an approach guaranteed to skew the results in favor of finding entry barriers. And this is not an esoteric issue. Questions regarding the existence of barriers to entry arise frequently in antitrust cases. This Court should intervene to correct the court of appeals' error.

## II. THIS COURT SHOULD CONSIDER WHETHER EXCESSIVE PUNITIVE DAMAGES AWARDS VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court has twice recently granted review to consider constitutional limits on punitive damages awards. In *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580, 1589 (1986), the Court noted that a challenge to punitive damages as excessive under the Eighth and Fourteenth Amendments "raise[d] important issues which, in an appropriate setting, must be resolved." Last Term, in *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1651 (1988), the Court stated that the issue of constitutional excessiveness "is a question of some moment and difficulty." In neither *Aetna* nor *Bankers Life*, however, did the Court have occasion to reach this constitutional issue. This case, in which the excessiveness issue was raised in and decided by the courts below, presents the opportunity to do so.

Multi-million dollar awards of punitive damages, while essentially unprecedented 20 years ago and still a rarity a decade ago, have today become commonplace. See, e.g., Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 139, 141-146 (1986); U.S. Dept. of Justice, Tort Policy Working Group, *An Update on the Liability Crisis* 47 (Mar. 1987) (reviewing the "extraordinary increase in recent years in the level of punitive damage awards"). The law reports and even the daily newspaper attest to their proliferation. This rapid and dramatic change has spawned extensive litigation over punitive damages issues.<sup>11</sup>

<sup>11</sup> A study commissioned by the Institute for Civil Justice of the Rand Corporation found that between the early 1970s and the early 1980s the average jury punitive damages award in Chicago increased nearly eight-fold, and the average in personal injury cases soared 6,900%, from \$28,000 in 1970-1974 to \$1.8 million in 1980-1984. See M. Peterson, et al., *Punitive Damages: Empirical Findings*, 14, 21 (1987); see also U.S. Dep't of Justice, Tort Policy Working Group, at 47-49.

As discussed below, this is a particularly compelling case for resolving the constitutional question. By every objective measure, the \$6 million punitive damages award returned by the jury was wildly excessive: it was completely disproportionate to any benefit BFI gained or could possibly have expected to gain from its price cuts; it was 20 times higher than any previous reported award of punitive damages in Vermont history; it was more than 100 times the amount of Kelco's actual injury; and it was nearly 40 times the treble damages award that Congress authorized for predatory pricing under the Sherman Act. Moreover, Vermont law leaves the jury free, with virtually no guidance from the court, to select a punitive damages figure; the award could as easily have been \$600,000 or \$60 million. Finally, the egregiousness of this award is compounded by the context in which it arose: massive non-compensatory judgments for alleged "predatory pricing," wholly out of harmony with the treble damages specified by Congress, are bound to over-deter the vigorous price competition that the federal antitrust laws seek to encourage.

### A. The Excessive Fines Clause Is Applicable To Punitive Damages.

This Court has never decided whether the Excessive Fines Clause of the Eighth Amendment is applicable to punitive damages. The issue arises with increasing frequency, however, and this Court alone can supply a definitive answer. It is unlikely, for instance, that any lower court that countenances an enormous and disproportionate punitive damages award under state law would nevertheless hold that the award is so excessive as to violate the federal Constitution.

The history of the Eighth Amendment shows that the Excessive Fines Clause—which traces its lineage to Magna Carta's prohibition of disproportionate "amercements" for civil wrongs—is applicable to punitive damages. That history has been outlined in the Court's opinions (see, e.g., *Solem v. Helm*, 463 U.S. 277, 284-286 (1983)) and



was fully explored in the briefs in *Aetna and Bankers Life*. See also Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 Vand. L. Rev. 1233, 1240-1269 (1987); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699, 1714-1717 (1987). Accordingly, we do not repeat that history here.

The lesson of history is reinforced by consideration of the nature and purpose of punitive damages. As their name indicates, punitive damages are a penalty meted out in civil cases to further public policies normally associated with the criminal law by punishing past misconduct and deterring future misconduct. This Court has recognized that "[p]unitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'" *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979), quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).<sup>12</sup> They satisfy virtually all of the criteria specified by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), to determine whether a nominally civil penalty has the characteristics of criminal punishment and therefore comes within the reach of constitutional protections normally or primarily applicable in criminal proceedings.<sup>13</sup>

<sup>12</sup> See also, e.g., *Memphis Community School Dist. v. Stachura*, 106 S. Ct. 2537, 2542 n.9 (1986) ("[t]he purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior"); *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (punitive damages are "'quasi-criminal'" and "punitive 'fine[s]'" that provide "a windfall to plaintiffs"); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) (punitive damages "serve the same function as criminal penalties and are in effect private fines").

<sup>13</sup> See Jeffries, 72 Va. L. Rev. at 150-151; Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 349 (1983); Grass, *The Penal Dimensions of Punitive Damages*, 12 Hastings Const. L. Q. 241 (1985); Note,

Several courts have disagreed, however, holding that the Excessive Fines Clause does not apply to punitive damages.<sup>14</sup> Although not disputing that such damages have the penal purposes of punishment and deterrence, these courts have mistakenly assumed that the Eighth Amendment was held inapplicable to non-criminal proceedings in *Ingraham v. Wright*, 430 U.S. 651 (1977). There the Court ruled that the Cruel and Unusual Punishments Clause of the Eighth Amendment did not apply to corporal punishment of school children. But *Ingraham* did not involve the Excessive Fines Clause, did not consider the history and policies of that Clause, and did not hold that all civil proceedings are beyond the reach of the Eighth Amendment. Indeed, the Court explicitly acknowledged that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments \* \* \* to justify application of the Eighth Amendment" (430 U.S. at 669 n.37).

That approach accords with other Eighth Amendment decisions. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 96 (1958) (plurality opinion of Warren, C.J.); *Carlson v. Landon*, 342 U.S. 524, 544-546 (1952) (applying Excessive Bail Clause of the Eighth Amendment in a civil proceeding). Accordingly, *Ingraham* cannot be under-

85 Mich. L. Rev. at 1719-1724; Note, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 Calif. L. Rev. 1433, 1446-1447 (1987).

<sup>14</sup> See *Electro Services, Inc. v. Exide Corp.*, 847 F.2d 1524, 1530 (11th Cir. 1988); *Help Hoboken Housing v. City of Hoboken*, 650 F. Supp. 793, 800 (D.N.J. 1986); *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (2d Dist. 1987), cert. denied, 108 S.Ct. 2023 (1988); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984); *Unified School Dist. No. 490 v. Celotex Corp.*, 6 Kan. App. 2d 346, 629 P.2d 196 (1981). Compare *Colonial Pipeline Co. v. Wright Contracting Co.*, 258 Ga. 115, 365 S.E.2d 827 (1988), appeal pending, No. 87-2007 (U.S. filed June 8, 1988) (relying on federal precedents in holding that the Excessive Fines Clause in the state constitution applies to punitive damages).

stood as an authoritative resolution of the applicability of the Excessive Fines Clause to punitive damages. Only this Court can clarify the reach of *Ingraham* and its import for attacks on the excessiveness of punitive damages under the Eighth Amendment.

**B. Under Any Objective Standard, The Punitive Damages Award In This Case Is Excessive.**

Under any objective standard, constitutional or non-constitutional, the \$6 million punitive damages award in this case is grossly excessive. Unfortunately, such a result is all too common in punitive damages cases. See, e.g., American College of Trial Lawyers, *Report of the Task Force on Litigation Issues* 4 (1986):

[O]ne of the greatest problems with the current tort system is the way in which punitive damages are handled. Awards often bear no relationship to deterrence and reflect a jury's dissatisfaction with a defendant and a desire to punish, often without regard to the true harm threatened by a defendant's conduct.

Under Vermont law, as the court of appeals noted, the jury is "invest[ed] \* \* \* with enormous discretion to award punitive damages when it decides that a party has acted maliciously" (App., *infra*, 10a), because Vermont "views punitive damages awards as 'incapable of precise determination'" (*ibid.* (citations omitted)). In these circumstances, it is essential that appellate review provide some meaningful check on the jury's exercise of this unfettered discretion. The court of appeals stated, however, that the amount awarded could not be set aside or reduced unless it was "'manifestly and grossly excessive'" (*ibid.* (citations omitted)).<sup>15</sup>

The standardless jury instructions required by Vermont law, when combined with the toothless exercise of

<sup>15</sup> This deferential approach is common among appellate courts reviewing punitive damages awards. See, e.g., ABA Special Committee on Punitive Damages, *Punitive Damages: A Constructive Examination* 6-7 (1986); Wheeler, 69 Va. L. Rev. at 290-291.

judicial review, are a virtual prescription for exorbitant punitive damages awards. Without guidelines to cabin their discretion, and without serious judicial scrutiny to correct abuses, juries are given sweeping power to determine whether and in what amount to award punitive damages. As a result, jurors are free to transfer vast amounts of money from defendants to plaintiffs not solely on the basis of adequate evidence and conscientious deliberations, but also on the basis of mistake, bias, caprice, or the irresistible lure of a large corporation's "deep pocket." In no other context does the law countenance such an arbitrary exercise of governmental power.

In this case, as we now show, the \$6-million punitive damages award is plainly a product of these irrational considerations. It is excessive under any objective measure—other than a single-minded, Robin Hood-like focus on the defendant's economic resources.

1. It has been said that an award of punitive damages should be "enough to 'smart'" and "sufficient to deter [the defendant] or any other rational [wrongdoer] from repeating such conduct in the future." *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 207 (1st Cir. 1987). This suggests that one appropriate point of reference in determining excessiveness, especially in the case of purely economic torts, is to compare the amount of punitive damages with the amount that the defendant gained or reasonably could have expected to gain from its misconduct. See Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1319 (1976); Note, *Status and Trends in State Product Liability Law: Punitive Damages*, 14 J. Legis. 249, 257 n.63 (1987).

Under that standard, the present award is grossly excessive. BFI in fact gained nothing here. Indeed, Kelco's claim is that BFI deliberately lost money by reducing its prices below cost before it withdrew from the market. Moreover, even allowing for the added profits that might have been secured through a monopoly, BFI could not possibly have expected to reap gains in the relatively



small Burlington roll-off market that would stand in any reasonable relation to the \$6 million award.

2. The punitive damages award also greatly exceeded the harm done or threatened to Kelco. See, e.g., *Rowlett*, 832 F.2d at 207, quoting Restatement (Second) of Torts § 908(2) (1979) ("the award \* \* \* must bear some relation to \* \* \* 'the nature and extent of the harm to the plaintiff that the defendant causes'"). The jury found that Kelco's actual injury was \$51,000—less than 1% of the punitive damages award. And even if BFI had succeeded in driving Kelco from the market, Kelco's loss would not have borne any reasonable relation to the \$6 million award. Not only was the award nearly 1000 times the total of Kelco's net worth in 1984 (C.A. App. 1268), but, by the very figures relied on to establish BFI's liability, Kelco's profit potential was a mere \$22,000 per year (App., *infra*, 8a).<sup>10</sup>

3. Another relevant criterion would be the civil punishments imposed in other, similar cases in the jurisdiction. See *Solem v. Helm*, 463 U.S. at 291, 298-300 (in determining whether a sentence is disproportionate under the Cruel and Unusual Punishments Clause, courts should look to other sentences imposed). The \$6 million award here is wildly disproportionate to penalties previously imposed in Vermont. Prior to this case, that State's highest reported punitive damages award was \$300,000 (based on compensatory damages of \$50,000). See *Greenmoss Builders Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66,

<sup>10</sup> It has been proposed that punitive damages be considered excessive if they exceed a prescribed multiple (typically three times) the amount of compensatory damages. See, e.g., Massey, 40 Vand. L. Rev. at 1273-1274; Wheeler, 89 Va. L. at 314-320; U.S. Dep't of Justice, Tort Policy Working Group, at 82; ABA Special Committee on Punitive Damages, at 6-10 to 6-12. See also *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1377-1378 (5th Cir. 1982) (en banc) quoting *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 331 (5th Cir. 1981) ("a formula of punitive damages equal to three times compensatory damages is a fairly good standard against which to assess whether a jury abused its discretion").

461 A.2d 414 (1983), *aff'd* on other grounds, 472 U.S. 749 (1985). After that, the next largest award that had been upheld by the Vermont Supreme Court was \$40,000, and the vast majority of awards it has reviewed have been under \$8,000.<sup>17</sup> This pattern of cases provides an objective benchmark of what juries in Vermont consider to be appropriate levels of punishment and deterrence—sums that are orders of magnitude less than the punitive damages awarded here.<sup>18</sup>

4. Yet another factor that could rationally be considered is the statutory penalty imposed by legislatures for similar misconduct. The accumulated experience and considered judgment of our legal system indicate that double or treble damages are generally a sufficient penalty to punish wrongful conduct, particularly in the economic arena.<sup>19</sup> In this very area of anti-competitive business

<sup>17</sup> See *Poulin v. Ford Motor Co.*, 147 Vt. 120, 513 A.2d 1168 (1986) (\$40,000); *Lent v. Huntoon*, 143 Vt. 539, 470 A.2d 1162 (1983) (\$25,000); *Glidden v. Skinner*, 142 Vt. 644, 458 A.2d 1142 (1983) (\$25,000); *Furno v. Pignona*, 147 Vt. 538, 522 A.2d 746 (1986) (\$10,000); *Pezzano v. Bonneau*, 133 Vt. 88, 329 A.2d 659 (1974) (7,500); *Murray v. J & B International Trucks, Inc.*, 146 Vt. 458, 508 A.2d 1351 (1986) (\$5,000); *A.M. Varityper v. Rabbo*, 146 Vt. 471, 505 A.2d 671 (1986) (\$4,000); *Solomon v. Atlantis Development, Inc.*, 147 Vt. 349, 516 A.2d 132 (1986) (\$2,500); *Gray v. Janicki*, 118 Vt. 49, 99 A.2d 707 (1953) (\$1,000); *Birkenhead v. Coombs*, 143 Vt. 167, 465 A.2d 244 (1983) (\$750); *Dean v. Arena*, 141 Vt. 647, 450 A.2d 1143 (1982) (\$500).

<sup>18</sup> Given the current climate of punitive damages litigation, it is not surprising that the court of appeals could find a handful of cases in other jurisdictions involving awards of a similar magnitude to that in this case. App., *infra*, 11a. Especially in this evolving area of law, such a comparison with a few carefully selected verdicts at the upper end of the spectrum hardly shows that the punitive damages awarded here—as well as those awarded in the other cases—are not constitutionally excessive.

<sup>19</sup> See, e.g., Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (treble damages); 35 U.S.C. § 284 (treble damages under the federal patent laws); False Claims Act, 31 U.S.C. § 3729(a) (treble damages, except double damages where a defendant cooperates with the government's investigation); Fair Labor Standards Act, 29 U.S.C. § 216(b) (double damages).

practices, Congress has provided treble damages under the Sherman Act (15 U.S.C. § 15) "to penaliz[e] wrongdoers and deter[] wrongdoing." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977). The punitive damages award in this case, which is 39 times greater than treble damages, is vastly disproportionate to this generally recognized societal norm.

Because the line between prohibited predatory pricing and aggressive price competition is often a fine one (see pages 10-11, *supra*), the excessiveness of the \$6 million punitive damages award—and particularly the disparity with the standard provided by federal law—presents a serious risk of chilling legitimate pro-competitive conduct that the Sherman Act was intended to foster. In other contexts, the Court has flatly prohibited any awards of punitive damages, reasoning that they would frustrate federal policies by deterring conduct that Congress meant to encourage. See, e.g., *Foust*, 442 U.S. at 50; see also *Gertz*, 418 U.S. at 349-350. *A fortiori*, courts must be vigilant in protecting against excessive awards of punitive damages that would have the same deleterious effects. A businessman considering cutting prices for pro-competitive reasons would think twice if the result might be ruinous punitive damages liability. See *Cargill*, 107 S. Ct. at 495 n.17; *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-442 (1978).

5. A large punitive damages award could also be justified in cases of particularly egregious misconduct, such as violent criminal behavior, acts involving a wanton disregard for the public safety, and the like. Society-at-large has a considerable interest in punishing and deterring conduct that could cause bodily harm to large numbers of individuals. But that criterion plainly is not implicated here. The court of appeals did not suggest—and on this record could not have suggested—that BFI's decision to lower prices to some of its customers, which involved no physical injury and little economic injury, was so egregious as to provide a possible justification for such an exorbitant punitive damages award.

6. The court of appeals ignored all the foregoing considerations and essentially looked no further than the fact that the punitive damages award was only .6% of BFI's net worth and 5% of its net income in 1986 (App., *infra*, 11a). This reasoning, while common in punitive damages cases, offers little assurance that an award is not excessive. Among other difficulties, it fails to recognize that companies (especially large companies) are likely to be involved in numerous suits in which punitive damages are sought; this increases the risk that the aggregate amount of punitive damages (including erroneous awards) could be unreasonably onerous and even disastrous for the defendant.

The approach of looking solely at the defendant's assets and income also blinks economic reality in assuming that a company's response to incentives is solely, or even primarily, a function of its size. In fact, of course, rational economic calculation is not automatically thrown out the window simply because the actor is big. A fine proportioned to the injury inflicted or gain anticipated from misconduct will have as much impact on a large and wealthy defendant as on a smaller one.<sup>20</sup>

Finally, exclusive focus on the size of the defendant's income serves merely to encourage appeals to prejudice, provincialism and caprice on the part of the jury and leads to preposterous windfalls for plaintiffs. Here, for example, Kelco's counsel suggested in his closing argument on damages that if the jury would be inclined to "fine" a defendant with \$20,000 in annual income \$1,000 for the conduct shown in this case, a fine of \$65 million

<sup>20</sup> Perhaps a defendant's size is relevant at the low end of the scale, but it is irrational to distinguish between, for example, a company with \$10 million in annual revenues and one with \$10 billion when considering an economic tort involving a \$51,000 injury. Significantly, the United States Sentencing Commission considered this precise problem in formulating sentencing guidelines and "reject[ed] the use of an organization's size or financial performance as a principal measure of penalties" (*Discussion Materials on Organizational Sanctions* 8.2 (July 1988)).



would be commensurate in light of BFI's nationwide revenues. App., *infra*, 34a.

\* \* \*

In sum, something is seriously wrong with the system for awarding punitive damages. With increasing frequency in recent years, juries have handed huge windfalls to plaintiffs in amounts bearing no relationship to any rationally relevant criterion or legitimate public policy. This case, in which the \$6 million award of punitive damages also poses a grave risk to federal antitrust policy, presents the important question of excessiveness in a particularly clear form. It is essential that the Court consider whether this type of legally-sanctioned wealth redistribution satisfies constitutional standards or precepts of fundamental fairness.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1988

## APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

August Term 1987

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No. 563

Argued: February 23, 1988

Decided: Apr. 21, 1988

Docket Nos. 87-7754 and 87-7758

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KELCO DISPOSAL, INC. and JOSEPH KELLEY,  
*Plaintiffs-Appellees,*  
*Cross-Appellants,*

-against-

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. and  
BROWNING-FERRIS INDUSTRIES, INC.,  
*Defendants-Appellants,*  
*Cross-Appellees.*

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Before: FEINBERG, *Chief Judge*, PRATT, *Circuit Judge*,  
and JOSEPH M. McLAUGHLIN, *District Judge* for  
the Eastern District of New York, sitting by  
designation.

McLAUGHLIN, *District Judge*:

Plaintiff sued under both the federal antitrust laws and  
Vermont tort law. A jury found against defendants on



both counts and imposed \$6 million in punitive damages on the state claim. The trial court denied defendants' motions for judgment notwithstanding the verdict or a new trial or remittitur; the court also ordered plaintiff to elect between its antitrust remedy (treble damages, attorneys' fees, and costs) and its state remedy (compensatory and punitive damages). The parties have cross-appealed. For the reasons discussed below, we affirm.

### FACTS

This case involves competition in the "roll-off" waste collection business in Burlington, Vermont. Roll-off waste collection is usually performed at large industrial locations and construction sites with the use of a large truck, a compactor, and a container that is much larger than the typical "dumpster."

Browning-Ferris Industries, Inc. ("BFI") and Browning-Ferris Industries of Vermont, Inc. (collectively "defendants") operate a commercial and industrial waste collection business from BFI's headquarters in Houston, Texas. In fiscal year 1986, BFI had revenues in excess of \$1.3 billion, net income of approximately \$137 million, and net assets of approximately \$980 million.

In 1973 defendants made two fateful decisions: they decided to enter the waste disposal business in Burlington and they appointed plaintiff Joseph Kelley to be district manager for the region. In 1976 defendants began to provide roll-off service in Burlington, and by 1980 they controlled 100% of the Burlington roll-off market.

Kelley left defendants in 1980, and formed his own waste disposal company, plaintiff Kelco Disposal, Inc. ("Kelco"). Soon thereafter, Kelco began to compete head-to-head with defendants in the Burlington roll-off market. In one year Kelco captured 37.6% of the market. In 1982 the figure rose to 42.7%. During 1982, defendants' new Burlington manager, Richard Mowbray, received or-

ders from Michael Gustin, his boss in Boston, to "Put Kelley out of business. Do whatever it takes. Squish him like a bug." Defendants' Burlington salesman was also ordered to put Kelly out of business and was told that if "it meant give [services] away, give [them] away."

In the fall of 1982, accordingly, defendants cut their roll-off haul prices from \$117 to \$65, a reduction of about 40%. This price-cutting policy lasted for approximately six months, although some contracts made during this period extended these low prices into 1984. Defendants' market share, which had declined precipitously from 1980 to 1982, remained relatively stable during the 1982-84 period. Kelco's and defendants' combined revenues from the Burlington market were roughly \$440,000. By 1985 Kelco had captured almost 56% of the market. In that year defendants left the market, and sold out to a third party. Since then, Kelco and this other company have been the only two competitors in the Burlington roll-off market. From 1981 to 1985, defendants and Kelco were the only competitors in the market.

In 1984, Kelley and Kelco brought this action. The complaint alleged that defendants had attempted to monopolize the Burlington roll-off market, in violation of section 2 of the Sherman Act, as amended, 15 U.S.C. § 2 (1982), and that defendants' conduct constituted interference with contractual relations under Vermont tort law.

Kelley's claims were severed from Kelco's, and Kelco's antitrust and tort claims were tried to a jury. Kelco's antitrust theory was that defendants had engaged in predatory pricing. At trial, Kelco's expert witness testified that from 1982 to 1984 defendants' average variable cost for roll-off service was roughly \$104 per haul. The expert included as variable costs disposal fees; drivers' salaries; depreciation of equipment, including trucks, containers, and compactors; selling and administrative costs;

and national overhead. In addition, numerous statements by defendants' officials that defendants had intended to put plaintiff out of business were introduced.

After a six-day trial on the liability issue, the jury found against defendants on both counts. A one-day trial on damages followed, and the jury returned a verdict for \$51,146 on the antitrust claim, and \$51,146 in compensatory damages and \$6 million in punitive damages on the state claim.

Defendants then moved for judgment n.o.v. or, in the alternative, for a new trial or remittitur. By order dated August 11, 1987 the motions were denied. An amended order of judgment dated October 19, 1987 awarded Kelco \$153,438 in treble damages and \$212,500 in attorneys' fees and costs on the antitrust claim under section 4 of the Clayton Act, 15 U.S.C. § 15 (1982), or, in the alternative, \$6,066,082.74 in compensatory and punitive damages on the state claim. Kelco was ordered to elect between the alternative federal and state remedies.

On appeal defendants have mounted a three-pronged attack on the judgment: (1) the jury's liability verdict was not supported by sufficient evidence; (2) the trial court's jury charge was erroneous as a matter of law; and (3) the punitive damages award must be either reversed or remitted.

Kelco's cross-appeal argues that it is entitled under federal law to attorneys' fees and costs, even if it elects state-law compensatory and punitive damages over the more modest federal treble damage award.

## DISCUSSION

### I. Liability and Punitive Damages

#### A. Attempted Monopolization

##### 1. Sufficiency of the Evidence

Judgment n.o.v. is warranted where the verdict is so unsupported by the evidence that it "could only have been the result of sheer surmise and conjecture," or where the movant's position is supported by such overwhelming evidence that a "reasonable and fair minded [person] could not [have] arrive[d] at a verdict against [it]." *Mattivi v. South African Marine Corp.*, "Huguenot", 618 F.2d 163, 168 (2d Cir. 1980).

A claim of attempt to monopolize has three elements: "(1) anticompetitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a 'dangerous probability' that the attempt will succeed." *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 790 (2d Cir.) ("IDC") (quoting *Northeastern Telephone Co. v. AT&T*, 651 F.2d 76, 85 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982)), cert. denied, 107 S. Ct. 3188 (1987). Defendants argue that Kelco failed to prove any of these elements at trial.

Kelco claims that defendants' anticompetitive or exclusionary conduct consisted of predatory pricing, and introduced evidence that defendants' price of \$65 per roll-off haul was below its average variable cost of roughly \$104 per haul. Defendants argue that Kelco's \$104 figure was inflated because Kelco's expert witness mistakenly characterized certain fixed costs as variable in making his computations. Asserting that depreciation of equipment, selling and administrative costs, and national overhead should have been considered fixed costs, defendants contend that their true average variable cost was less than \$50 per haul, well below their \$65 haul charge.



A firm engaged in predatory pricing bites the bullet and forgoes present revenues to drive a competitor from the market. Its intent, of course, is to recoup lost revenues through higher profits when it succeeds in making the environment less competitive. *Northeastern Telephone*, 651 F.2d at 86 (quoting 3 P. Areeda & D. Turner, Antitrust Law ¶ 711b, at 151 (1978)); see *Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 S. Ct. 484, 493 (1986). Prices that are below reasonably anticipated marginal cost, and its surrogate, reasonably anticipated average variable cost, see *Northeastern Telephone*, 651 F.2d at 88, are presumed predatory. *Id.* By definition variable costs are dependent on the firm's output, while fixed costs are not. See *id.* at 86. The characterization of certain costs as either variable or fixed frequently becomes a battleground where the plaintiff proceeds on a predatory pricing theory. The reason is obvious: the higher a party's average variable cost, the more likely it is that the party has priced below that cost.

Defendants argue that equipment depreciation should have been considered a fixed cost because defendants' accountants have always treated it so. Passing, for the moment, the bootstrap feature of this argument, the general legal rule is that depreciation caused by use is a variable cost, while depreciation through obsolescence is a fixed cost. See *id.* The characterization of legitimately disputed costs is a question of fact for the jury. *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 891 n.6 (5th Cir. 1984), cert. denied, 469 U.S. 1160 (1985); see *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1036-38 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982). The jury may consider, but obviously cannot be bound by, a party's characterization of its own costs.

In this case, we conclude that the jury could have reasonably characterized equipment depreciation as a variable cost. The waste disposal industry makes intensive

use of heavy equipment. There was no evidence presented that defendants' trucks, compactors, or containers became obsolete; rather, the picture painted was one of constant wear, tear, and damage due to use.

Defendants do not challenge the characterization of disposal fees and drivers' salaries as variable costs. Adding equipment depreciation costs to these other costs yields an average variable cost of roughly \$81 per haul, well above defendants' \$65 fee. Based on these figures alone, we conclude that the jury could have found that defendants engaged in predatory pricing. There is, therefore, no need to address defendants' challenge to the characterization of other costs.

Turning to the second element of an attempted monopolization claim, we reject defendants' attack upon the finding that they had specific intent to monopolize the market. Sufficient evidence of such intent was presented to the jury. Defendants' own officials frequently reaffirmed their goal of driving Kelley and Kelco out of the Burlington market. Defendants argue, as they did to the jury, that these statements merely reflected defendants' desire to remain competitive with Kelco, and cannot support a finding of specific intent to monopolize. The jury, however, also heard evidence that defendants had engaged in predatory pricing, and could have inferred intent from this fact. See *Northeastern Telephone*, 651 F.2d at 85. The "tough talk" by defendants' employees, coupled with the proof of predatory pricing, more than supports the jury's finding of a specific intent to monopolize.

Defendants' final challenge to the verdict is that, because the so-called "barriers to entry" in the Burlington roll-off business were low, a rational jury could not have concluded that there was a dangerous probability that BFI would monopolize the market. We reject this argument for three reasons.

First, the jury could have found that barriers to entry were, indeed, not at all low. Only two companies en-

tered the relevant market during the eleven-year period from 1976-87. In addition, there was evidence that the cost of entering the market exceeded \$300,000. Given the size of the market in 1982-84, roughly \$440,000 in annual revenues, a firm that controlled 50% of the market and had a 10% return on revenue—which the parties do not dispute is a fair rate of return—would realize only a \$22,000 annual profit. Such numbers would make a potential entrant think twice before making a \$300,000 investment. *Compare United States v. Waste Management, Inc.*, 743 F.2d 976, 983 (2d Cir. 1984) (finding of low entry barriers in large metropolitan waste disposal market with many competitors was not clearly erroneous).

Second, numerous market characteristics other than barriers to entry must be considered in determining whether a dangerous probability of monopolization exists. *See IDC*, 812 F.2d at 792 (some other factors are “the strength of the competition, the probable development of the industry, . . . the nature of [defendant’s] anticompetitive conduct and the elasticity of consumer demand”). A survey of these other characteristics amply supports a finding of dangerous probability in this case. The Burlington waste disposal market was not unduly competitive. It supported only one participant in 1980, and two from 1981 to 1987. Consumer demand was rather inelastic because there were few, if any, alternatives to large-container waste disposal service. On top of this, there was compelling evidence that defendants intended to monopolize the market and were already executing a plan to further this goal.

Third, defendants possessed a significant market share. During the period in which defendants engaged in predatory pricing, their market share was above 55%. As late as 1980, their share had been 100%. Considering defendants’ market share along with other market characteristics, the jury could reasonably have concluded that

defendants had a dangerous probability of acquiring monopoly power.

In summary, we find that Kelco presented sufficient evidence for the jury to find that defendants attempted to monopolize the Burlington roll-off waste disposal market. Defendants concede that if Kelco prevails on the antitrust claim, then the defendants are also liable on the state tort claim. Accordingly, we conclude that the jury verdict on both claims is supported by sufficient evidence.

## 2. The Jury Charge

Defendants contend that the trial judge erroneously instructed the jury that Kelco could prove predatory pricing by showing that defendants had priced below their average variable cost; defendants now opt for a stricter standard: their *reasonably anticipated* average variable cost. Interesting as the distinction is, we need not address this argument because defendants have failed to preserve it for appeal under Fed. R. Civ. P. 51.

Defendants’ proposed jury charge did not refer to reasonably anticipated variable costs. Although counsel for defendants did refer to reasonable anticipation at a charging conference, he did so in the context of the specific intent element of attempted monopolization, not the predatory pricing element. We thus conclude that defendants failed to state distinctly their objection to the challenged portion of the judge’s charge. *See Fed. R. Civ. P. 51*. Absent plain error, defendants are precluded from raising the issue on appeal. *See Brenner v. World Boxing Council*, 675 F.2d 445, 456 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982); *Cohen v. Franchard Corp.*, 478 F.2d 115, 122-25 (2d Cir.), *cert. denied*, 414 U.S. 857 (1973).

Assuming *arguendo* that the charge was incorrect, we do not conclude that the error constituted plain error.



Given the complexity of this case and the quantum of evidence supporting Kelco's claim of anticompetitive conduct by defendants, we find that the trial court's error was not sufficiently serious to affect the "very integrity of the trial." *Brenner*, 675 F.2d at 456 (quoting *Modave v. Long Island Jewish Medical Center*, 501 F.2d 1065, 1072 (2d Cir. 1974)). Accordingly, we decline to review defendants' assignment of error.

### B. Punitive Damages

Defendants' final argument is that the \$6 million punitive damage award should be reversed or remitted. Punitive damages are designed both to punish the wrongdoer and to deter similar conduct. See *Aldrich v. Thomson McKinnon Securities, Inc.*, 756 F.2d 243, 249 (2d Cir. 1985). Vermont law, which applies here, see *Whitney v. Citibank, N.A.*, 782 F.2d 1106, 1118 (2d Cir. 1986), invests a jury with enormous discretion to award punitive damages when it decides that a party has acted maliciously. See *Pezzano v. Bonneau*, 133 Vt. 88, 90, 329 A.2d 659, 660 (1974). Vermont, like most jurisdictions, views punitive damage awards as "incapable of precise determination." *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 77, 461 A.2d 414, 419 (1983) (quoting *Lanfranconi v. Tidewater Oil Co.*, 376 F.2d 91, 96 (2d Cir.), *cert. denied*, 389 U.S. 951 (1967)), *aff'd on other grounds*, 472 U.S. 749 (1985). Vermont courts have refused to require that there be some kind of mystical ratio between punitive and compensatory damages. See *Pezzano*, 133 Vt. at 92, 329 A.2d at 661; see also *Aldrich*, 756 F.2d at 249 ("punitive damages need bear no exact relationship to compensatory damages"). Finally, Vermont courts will interfere with a punitive damages award only if it is "'manifestly and grossly excessive.'" *Greenmoss*, 143 Vt. at 77, 461 A.2d at 420 (quoting *Pezzano*, 133 Vt. at 91, 329

A.2d at 661 (quoting *Gray v. Janicki*, 118 Vt. 49, 42, 99 A.2d 707, 709 (1953))).

Bearing this in mind, we conclude that the punitive damage award in this case should not be disturbed. Faced with evidence that defendants wilfully and deliberately attempted to drive Kelco out of the market, the jury imposed punitive damages amounting to less than .5% of BFI's revenues, approximately .6% of its net worth, and less than 5% of its net income, for fiscal year 1986. This amount is not inconsistent with punitive damages levied in other jurisdictions against large corporations. *E.g.*, *T.D.S., Inc. v. Shelby Mutual Insurance Co.*, 760 F.2d 1520, 1531 & n.10 (\$2.1 million award was approximately 1% of defendant's assets), *modified in part*, 769 F.2d 1485 (11th Cir. 1985); *Aldrich*, 756 F.2d at 249 (remitting award to \$1.5 million, which was roughly .9% of defendant's net worth); *Hawkins v. Allstate Insurance Co.*, 152 Ariz. 490, 501, 733 P.2d 1073, 1085 (\$3.5 million award amounted to roughly .25% of defendant's assets and 1% of defendant's annual income), *cert. denied*, 108 S. Ct. 212 (1987); *Downey Savings and Loan Association v. Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 1101, 234 Cal. Rptr. 835, 851 (\$5 million award exceeded 7% of defendant's annual income, and was 1% of defendant's net worth), *review denied*, No. S 000553 (Cal. May 27, 1987), *petition for cert. filed*, 56 U.S.L.W. 3115 (U.S. July 22, 1987) (No. 87-159); *Moore v. American United Life Insurance Co.*, 150 Cal. App. 3d 610, 641-42, 197 Cal. Rptr. 878, 899 (1984) (\$2.5 million award exceeded 6% of defendant's annual income).

After reviewing the record, we conclude that the punitive damage award fell within the allowable limits of Vermont law, and was not motivated by unfair prejudice. See *Pezzano*, 133 Vt. at 91, 329 A.2d at 661. In addition, we reject the defendants' notion that the award violates the eighth amendment's proscription

against excessive fines. Even if the eighth amendment does apply to this nominally civil case, see *Ingraham v. Wright*, 430 U.S. 651, 664-72 (1977); *Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir.), cert. denied, 389 U.S. 835 (1967); see also *Bankers Life and Casualty Co. v. Grenshaw*, No. 85-1765, 56 U.S.L.W. 3423-24 (U.S. argued Nov. 30, 1987), we do not think the damages here were so disproportionate as to be cruel, unusual, or constitutionally excessive. Accordingly, we decline to interfere with the punitive damage award.

## II. Attorneys' Fees

Kelco's cross-appeal demands attorneys' fees under 15 U.S.C. § 15 when it rejects a modest federal remedy in favor of a generous state law remedy. Kelco maintains that because the fee award is not duplicative or inconsistent with the state remedy, it should not be precluded from receiving federal statutory attorneys' fees in addition to its state tort remedy. Defendants respond that Kelco's state claim provides it with a complete remedy, and that an additional award of attorneys' fees would provide Kelco with a windfall.

Section 15 is a statutory exception to the common law rule against awarding attorneys' fees. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 260-61 (1975). As explained in great depth by the *Alyeska Pipeline* Court, the general rule, more commonly known as the "American Rule," dictates that, absent statutory authority, a prevailing party is not entitled to compensation for its attorneys' fees. See *id.* at 247-62. This rule has strong roots in American jurisprudence, see *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796), and rests upon the common law judgment that "one should not be penalized for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

The common law hostility to attorneys' fees rests upon several considerations that include the potential chilling

effect that fee shifting would have on indigents with compelling claims, "the time, expense, and difficulty of litigating the fee question, and the possibility that the principle of independent advocacy might be threatened by having 'the earnings of the attorney flow from the pen of the judge before whom he argues.'" *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters*, 456 U.S. 717, 725 (1982) (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974)).

Kelco wears two hats in this action. It wears one as a private victim seeking personal redress for an egregious infraction of Vermont tort law. It wears the other as a public defender of broad social objectives that casts it in the role of a surrogate enforcer of the federal antitrust laws. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 131, 133 (1969); *Waldron v. Cities Service Co.*, 361 F.2d 671, 673 (2d Cir. 1966), *aff'd*, 391 U.S. 253 (1968). In the latter capacity, to recover treble damages and thereby deprive violators of the fruit of their illegality, see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977), a plaintiff must prove behavior that injures competition, as distinct from a competitor. *Cargill*, 107 S. Ct. at 489; *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). A plaintiff that undertakes the role of private attorney general and recovers treble damages, is awarded attorneys' fees for safeguarding paramount and pervasive values that are protected by federal law.

The question presented is whether a plaintiff that chooses to forgo treble damages available under § 15 and elects instead a far larger reward under state law may still collect attorneys' fees. Not surprisingly, the sparse language of § 15 and its extensive legislative history fail to address this issue.

We are unwilling to depart from the general rule and "fashion [a] drastic new rule[] with respect to the

allowance of attorneys' fees to the prevailing party in federal litigation." *Alyeska Pipeline*, 421 U.S. at 269. Two reasons buttress this conclusion. First, the policy embodied in § 15 will in no way be hindered by our holding because the sum available in the state remedy package exceeds the sum of treble damages, attorneys' fees, and costs. Second, a plaintiff that chooses not to pursue its federal remedy has stepped outside its role as private attorney general, and thus should not come within the ambit of § 15.

Where, as here, the prevailing party elects a remedy provided by state law, and thereby forgoes its treble damage award, it should forgo the entire remedy provided by federal law, including attorneys' fees. Attorneys' fees are an integral member of the federal remedy. This is one of those cases where the tail must go with the hide. Having turned its back on the federal remedy, Kelco must perforce lose the federal reward. In any event, its \$6 million dollar punitive damage award should provide an adequate fund from which Kelco may pay its attorneys' fee without discomfiture. We therefore conclude that the district court properly ordered Kelco to elect between the alternative remedies.

### CONCLUSION

For the forgoing reasons the judgment of the district court is affirmed.

### APPENDIX B

### UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

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Civil Action No. 84-180

KELCO DISPOSAL, INC., and JOSEPH KELLEY

v.

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., and  
BROWNING-FERRIS INDUSTRIES, INC.

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[Filed Aug. 11, 1987]

### OPINION AND ORDER

On May 28, 1987, defendants filed with this Court a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur. Plaintiff opposed the motion on July 10, 1987. For the reasons outlined below, the motion is DENIED, and the judgment stands as entered.

### BACKGROUND

This case involved allegations of attempted monopolization in violation of Section 2 of the Sherman Act. In particular, plaintiff Kelco Disposal, Inc. (Kelco)<sup>1</sup> claimed that defendants Browning-Ferris Industries of Vermont,

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<sup>1</sup> The parties have agreed that this antitrust action involves only claims by plaintiff Kelco. Plaintiff Joseph Kelley's breach of contract claims have been severed.



Inc., and Browning-Ferris Industries, Inc. (together referred to as BFI), in violation of the antitrust laws, deliberately cut their prices below cost for the purpose of putting Kelco out of business. Additionally, plaintiff charged that defendants' pricing conduct violated Vermont state tort law by intentionally interfering with contractual relations between Kelco and its customers. After six days of trial on the issue of liability, a jury found the defendants liable under both counts. Following one day of testimony on the issue of damages, the same jury returned a verdict for the plaintiff in the amount of \$51,146 on the antitrust claim, \$51,146 for compensatory damages on the state claim, and \$6,000,000 in punitive damages on the state claim. Judgment was entered on the verdict on May 14, 1987. This motion was timely filed.

### DISCUSSION

Defendants claim that three points warrant judgment in their favor. First, they allege that the evidence is insufficient to sustain the verdict. Within this insufficiency argument defendants address a number of issues on both the antitrust and state claims. Second, the defendants alternatively argue that a new trial is necessary because the liability verdict is against the weight of the evidence and because of an error in the charge. Finally, defendants argue that the punitive damages award should be reduced because it is grossly excessive, is against public policy, and is a result of bias and prejudice.

The Second Circuit has established that the standard for granting judgment n.o.v. is the same as that for a directed verdict: that no reasonable mind could differ on the conclusion. There must be either "a complete absence of evidence supporting the verdict" such that it must have resulted from "sheer surmise or conjecture" or "such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him." *Mallis v. Bankers*

*Trust Co.*, 717 F.2d 683, 688-89 (2d Cir. 1983) (quoting *Mattivi v. South African Marine Corp.*, "Huguenot", 618 F.2d 163, 168 (2d Cir. 1980)). The standard therefore permits the Court to award the defendants judgment n.o.v. even if the plaintiff has produced some evidence in its favor if the evidence against the plaintiff is so overwhelming that reasonable minds could not find a verdict in its favor.

In determining this motion, the Court views the evidence in the light most favorable to the nonmovant, plaintiff, and gives it all reasonable inferences fairly supported by the evidence. The Court does not evaluate the credibility of any of the witnesses or the weight to be given any evidence in determining this motion. *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 84 (2d Cir. 1981). As the parties have pointed out, the courts have not been loathe to grant either judgment n.o.v.'s or directed verdicts in predatory pricing cases; however, that fact alone does not determine that judgment n.o.v. is appropriate in this case. Instead, we must look at each element of defendants' claims.

### I. The Sufficiency of the Evidence on the Antitrust Claim

This case presents a very tricky type of anticompetitive conduct—predatory pricing. In essence, predatory pricing consists of "the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition." 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 711b, at 151. As the U.S. Supreme Court has recognized, predatory pricing is a highly speculative economic practice. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 54 U.S.L.W. 4319, 4323, 106 S.Ct. 1348, — (1986).<sup>2</sup> It requires a company to forego cur-

<sup>2</sup> *Matsushita* was a massive antitrust action between Japanese and American manufacturers of consumer electronic products. The



rent profits in the hope of forcing competitors out of business and then being able to raise prices high enough to regain the profits it lost. Of course, once it raises prices, competitors can reenter the market with a lower profit margin, thus destroying the monopoly and the attempted recoupment. Further, lowering price is usually a highly competitive move, i.e., exactly the type of behavior the antitrust laws are designed to encourage. Thus, commentators maintain that true predation is rare, and successful predation even rarer. See sources cited *id.*

As the violation charged here is of Section 2 of the Sherman Act, attempted monopolization, we need not consider whether defendants were or even would have been successful in a predation scheme; instead, we need only consider whether a reasonable jury could have found that defendants attempted to price predatorily with the specific intent of monopolizing the market and with a dangerous probability of success. In so considering, we keep in mind the Supreme Court's caution to evaluate predation cases with care because mistakes can "chill the very conduct the antitrust laws are designed to protect." *Id.* at 4324, 106 S. Ct. at —; *Cargill, Inc. v. Monfort of Cal., Inc.*, 55 U.S.L.W. 4027, 4032 n.17, 107 S. Ct. — (1986).

plaintiffs alleged that the defendants engaged in a conspiracy to fix artificially high prices in Japan and maintain low prices in the U.S. The bulk of the opinion, therefore, deals with predatory pricing conspiracies. Predatory pricing conspiracies are arguably even rarer than schemes by a single firm because any one conspirator has a strong incentive to cheat and let the others bear the brunt of the necessary losses. See *Matsushita*, 54 U.S.L.W. at 4325, 106 S. Ct. at —. Further, *Matsushita* was in the nature of a summary judgment motion in which the Court found little evidence of any conspiracy at all; therefore, given the economic speculativeness of such a scheme, the Court was reluctant to find any material issue of fact.

### A. Evidence of Predatory Conduct

The standard for predatory pricing in this circuit is set out in *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76 (2d Cir. 1981). That standard provides that "prices below reasonably anticipated marginal cost will be presumed predatory, while prices above reasonably anticipated marginal cost will be presumed non-predatory." *Id.* at 88. Marginal cost, however, is "the increment to total cost that results from producing an additional increment of output," 3 P. Areeda & D. Turner, *supra*, ¶ 712, at 155, and cannot be measured by conventional accounting methods. Therefore, the Court adopted average variable cost as its surrogate. *Northeastern*, 651 F.2d at 88. As a result, to prove its case of predatory pricing against defendants, plaintiff had to prove that defendants' prices were below their reasonably anticipated average variable cost.

After reviewing the testimony regarding BFI's prices and the comparison of those prices to BFI's average variable costs, the Court concludes that a reasonable jury could have believed the figures advanced by plaintiff's expert and from those figures could have concluded that defendant engaged in predatory conduct. This is not to say that defendant did not present testimony to the contrary. On a motion for judgment n.o.v. however, we need only determine whether a reasonable jury *could have* accepted plaintiff's view. Whether the Court agrees with the jury's verdict is irrelevant. In this case, a reasonable jury certainly could have believed plaintiff's expert and disbelieved defendants', finding sufficient evidence to return a verdict of liability.<sup>3</sup>

<sup>3</sup> Defendants point out certain specific testimony they consider conclusive or in error. For example, defendants claim that "[i]n-terest on debt and corporate overhead are clearly fixed costs under *Northeastern*." Memorandum In Support of Defendants' Motion for Judgment Notwithstanding the Verdict, at 19. However, the

Defendants attach some importance to the fact that the jury charge failed to instruct the jury to consider "reasonably anticipated" average variable cost.<sup>4</sup> Defendants apparently argue that their internal accounting system should define "reasonably anticipated" costs because BFI chose their system precisely to cover what they reasonably anticipated would happen. Assumedly, if fleshed out, defendants' argument would be that the jury should have given *its* choice of accounting method more weight than plaintiff's expert's retroactive analysis, and would have done so if the jury had utilized the "reasonably anticipated" language. Further, defendants claim that the *Northeastern* court held "that business executives cannot be held liable for predatory pricing unless they were on notice that the prices charged were below cost." Defendants' Memorandum, at 19. The court actually said "since businessmen are entitled to notice that their pricing decisions may subject them to antitrust liability, they should be allowed to adopt any reasonable and consistent method for allocating joint expenditures." 651 F.2d at 88 n.19. The Court's concern was that a business

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*Northeastern* court states that interest on *bonded* debt and *irreducible* overhead are fixed costs, not necessarily *all* debt and overhead. 651 F.2d at 86. Further, the court acknowledges that "all costs are variable in the long run." *Id.* at 86 n.12. In this case, plaintiff's expert outlined which costs he included in his analysis and explained why he included interest and overhead. See Testimony of Peter Battelle, Trial Transcript of March 25, 1987, at 46-53, 89-95. As the *Northeastern* court concluded, whether a particular cost is fixed or variable depends on the particular situation and accounting methods used. In this case, plaintiff's expert chose to include certain costs as variable, and the jury could reasonably have accepted his conclusions.

<sup>4</sup> We note, in addition to the discussion below, that defendants failed to timely object to the charge on this issue and in fact never requested such language in their request to charge. Their objection, therefore, is fatal, unless the failure to include those terms was plain error. As our textual discussion indicates, we believe it was not.

be able to allocate costs between products or services in any way it chooses, as long as the allocation is financially sound. The issue of allocation of joint expenditures does not really concern us here. Certainly, BFI's allocation of its corporate debt interest, national overhead, and income taxes deserves weight, but as plaintiff's expert conceded, those were minor factors in his determination. Testimony of Peter Battelle, Trial Transcript of March 25, 1987, at 94. The jury was certainly entitled to consider his calculations in addition to defendants' own accounting testimony. In crediting plaintiff's expert's analysis of the situation, the jury clearly indicated their disbelief in the reasonableness of defendants' approach. Any error in the omission of language from the charge was therefore obviously harmless.

In its motion for judgment n.o.v., defendants attack at length plaintiff's expert's accounting methods. In essence defendants argue that Battelle's conclusion is legally incompetent. However, as the Second Circuit has recognized, what costs are variable depends on the situation. 651 F.2d at 86. It is therefore up to the jury to decide whether to accept Battelle's analysis of which costs are variable or defendants' expert, Shank's. A reasonable jury certainly could have believed Battelle's rationale for including such items as national overhead and could have believed that BFI had no basis for their reliance on EBINT as their measure of cost. Defendants' argument merely illustrates their disagreement with Battelle's conclusions. It does not provide a basis for overturning the verdict.

Defendants argue that the jury's verdict should be overturned because defendants had no motive to engage in predatory pricing as they could not have recouped their losses. Again, whether defendants had a motive or not does not change the fact that a reasonable jury could have found that defendants engaged in this anticompetitive conduct. The same hold true with respect to defend-



ants' argument that ease of entry into the roll-off market prevented the plaintiff from proving that there was a dangerous probability that defendant would succeed at monopolizing the market. Even though the court in *United States v. Waste Management*, 743 F.2d 976 (2d Cir. 1984), found that the trash collection business in the Dallas/Fort Worth area was easy to enter into, the testimony in this case included evidence to the contrary. Therefore, the jury could have found that in the Burlington, Vermont, area the roll-off market was not easy to enter, and there was a dangerous probability that BFI would monopolize the market if its predatory conduct succeeded.

#### B. Evidence of the Relevant Product Market

BFI maintains that the relevant product market was all commercial and industrial waste-hauling, not just roll-off services. They rely on the *Waste Management* case again, *id.*, which found that roll-off services were not a distinct product market in the Dallas/Fort Worth area. Again, the testimony in this case was sufficient for a jury to find that roll-off services are a distinct product market in the Burlington area. The fact that a federal circuit court found that the waste-hauling business was one market in Dallas-Fort Worth does not foreclose a jury here in Vermont from differently evaluating the market here.

#### C. The Evidence of Antitrust Injury

Defendants claim that plaintiff failed to prove an essential element of its antitrust claim: that it suffered injury of the type the antitrust laws were intended to prevent. In other words, they allege that even if BFI did price its roll-off services below its average variable cost, plaintiff did not show that it was injured by BFI's pricing. Plaintiff did, however, present evidence from several clients that they gave their business to BFI

rather than Kelco because of BFI's prices. See, e.g., Testimony of Leland H. West, Trial Transcript of March 26, 1987, at 19-20. Further, Joseph and Muriel Kelley testified that Kelco began to lose new business. From this testimony, as well as the testimony of plaintiff's expert, the jury reasonably could have concluded that Kelco suffered damages from an antitrust violation by BFI.

#### D. The Evidence of Causation on the State Law Claim.

Defendants argue that plaintiff failed to show causation on its state law claim. The Vermont tort of intentional interference with contractual relations requires that a plaintiff prove that (1) it had existing or prospective business relationships, 2) defendants interfered with those relationships, 3) the interference was intentional, and 4) it was improper. As we have discussed above, the jury could reasonably have found that defendants engaged in intentional illegal conduct. There was also sufficient testimony for a jury to find that that conduct interfered with plaintiff's business relations. See, e.g., Testimony of Leland H. West, *supra*.

We therefore find that the evidence was clearly sufficient to support the jury's verdict in favor of plaintiff on its antitrust claims. Defendants' motion for judgment n.o.v. is DENIED.

#### II. The Necessity for a New Trial

As we have denied defendants' motion for judgment n.o.v., we must go on to consider their alternative motion for a new trial. Their first ground for seeking a new trial is that the verdict is against the weight of the evidence. The standard for granting a motion for a new trial is more lenient than for judgment n.o.v. or a directed verdict. 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2806 (1973). The Court may order a new trial even if substantial evidence supports the

verdict, if the Judge believes the verdict goes against the weight of the evidence. The new trial motion allows the Court to weigh the evidence for itself. *Id.* However, as Wright & Miller aptly point out, "the more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury." *Id.* at 44. This case is one in which the evidence does so conflict; therefore, we are reluctant to substitute our judgment for the jury's. Further, we believe the weight of the evidence does support the jury's verdict.

Defendants' second ground for seeking a new trial is that the Court erred in neglecting to charge the jury that the average variable cost must be "reasonably anticipated" across a product line. We have addressed this issue above and find no reason to change our analysis on this review.

### III. The Appropriateness of a Remittitur

As defendants point out, this Court has the power to order a remittitur if the punitive damages award in a case is excessive. The facts defendants recite, e.g., that this appears to be the largest verdict in Vermont history, that the award is 1,000 times plaintiff's net worth, or that the punitive award dwarfs the compensatory one, are not decisive of this matter. The jury could have arrived at this figure as a reasonable punitive measure against a large company practicing predatory conduct towards a small one using the criteria given to it by this Court in its charge. Defendants' motion for remittitur is therefore DENIED.

### CONCLUSION

For the reasons discussed above, defendants' motions for judgment n.o.v., new trial, and remittitur are

DENIED. The judgment on the verdict stands as entered.

SO ORDERED

Dated at Rutland in the District of Vermont this 11th day of August, 1987.

/s/ Franklin S. Billings, Jr.  
FRANKLIN S. BILLINGS, JR.  
District Judge



UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

Civil Action No. 84-180

KELCO DISPOSAL, INC. and JOSEPH KELLEY

v.

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. and  
BROWNING-FERRIS INDUSTRIES, INC.

AMENDED ORDER OF JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED, based upon the verdicts and special interrogatories of the jury entered March 31, 1987 and April 8, 1987, that on Counts I, II and IV of the Complaint, asserted solely on behalf of Plaintiff Kelco Disposal, Inc., that Kelco Disposal, Inc. is awarded judgment jointly and severally against Defendants Browning-Ferris Industries, Inc. and Browning-Ferris Industries of Vermont, Inc. as follows: The sum of \$153,438.00 as treble damages and \$212,500.00 as attorneys' fees and costs under 15 U.S.C. § 15; or in the alternative, the sum of \$6,066,082.74 as compensatory and punitive damages on the state law claim.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff Kelco Disposal, Inc. shall elect between the above alternative remedies when the judgment becomes completely final following exhaustion of all post-trial motions or appeals, if applicable, by filing with the Clerk prior to any enforcement proceedings a Certificate of Election. This election shall then become part of this Amended Order of Judgment. Both remedies shall accrue post-judgment interest at the federal statutory rate from the original date of entry of judgment herein, May 14, 1987.

IT IS FURTHER ORDERED AND ADJUDGED, pursuant to the Stipulation of the Parties for Dismissal of Count III, that Count III of the Complaint is hereby dismissed with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that to the extent that any claims asserted by Joseph Kelley personally are not merged or subsumed in the amended judgments entered herein with respect to Counts I, II, III and IV of the Complaint, that said claims of Plaintiff Joseph Kelley are hereby dismissed.

SO ORDERED.

Dated at Rutland, Vermont in the District of Vermont  
this 19 day of October, 1987.

/s/ Franklin S. Billings, Jr.  
FRANKLIN S. BILLINGS, JR.  
District Judge

[amended. j09]

## APPENDIX C

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 1st. day of June one thousand nine hundred and eighty-eight

Docket No. 87-7754, 87-7758

KELCO DISPOSAL, INC. and JOSEPH KELLEY,  
*Plaintiffs-Appellees,*  
*Cross-Appellants,*

v.

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. and  
BROWNING-FERRIS INDUSTRIES, INC.,  
*Defendants-Appellants,*  
*Cross-Appellees.*

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants, Cross-Appellees BROWNING-FERRIS INDUSTRIES OF VERMONT and BROWNING-FERRIS INDUSTRIES, INC.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith  
ELAINE B. GOLDSMITH  
Clerk

## APPENDIX D

MR. HEMLEY: Thank you, your Honor. Good afternoon, ladies and gentlemen. Last week you people concluded from the evidence which we've presented that Joseph Kelley's claims were true. They're no longer mere allegations. You people have found them to be fact.

You've found to be fact that from 1982 to 1984 BFI intentionally attempted to monopolize the roll-off trash disposal market in Burlington, Vermont, and to drive Joe Kelley out of business by illegally cutting his prices. That was the antitrust violation.

And you also found that in—at the same time you found BFI violated state law by intentionally and illegally interfering with Kelley's business relations.

In short, as you have found, BFI tried to put Kelley out of business so that they could have the entire roll-off market to itself and charge whatever prices it wanted to.

BFI came to court and they tried to convince you of the contrary. They tried to claim that that didn't happen. They tried to claim that what we knew happened and what we alleged happened, never took place. And you people have found that not to be the case.

Now, today it's my pleasure and my privilege to ask you to award damages. There are two kinds of damages, as the judge will tell you. And I've made a very simple chart here to describe them.

There are compensatory damages, which are damages that are intended to restore Joseph Kelley to the position he would be in had the illegal price cutting not taken place. And that's why they are called compensatory. They're to compensate him. The judge will tell you that you are to award him the amount of lost profits that he suffered because of the antitrust violation and because of the state law violation.

I want to just say a word about that so it's not too confusing. There really is just one conduct here, and that was the illegal price cutting. It gave rise to two different kinds of violations, the federal law violation and

the state law violation. They are, in fact, separate violations, although the damages are the same for each one.

It's important, for a number of reasons, that you put down the number twice. And the judge will give you a form with which to do that, that you express, even if it's the same number, separately, the antitrust damages and the state law damages.

Now, one of the reasons that it's important is the Vermont law and the federal law are slightly different in some important respects. One way in which it's different is that under state law, we're entitled to interest on the amount of damages. And the judge will tell you how to compute the interest.

\* \* \*

The second kind of damages is called punitive damages. And punitive damages in this case are very, very important. And they are for a different purpose. They are intended to send a message, as the judge will tell you. This will be your opportunity to make a statement, for you six people to send a message back to Houston, send a message back to Wall Street to tell these people that the conduct that they engaged in is simply not acceptable, that you six people and people like you will not tolerate business tactics like that. That when you've found that this company intentionally tried to drive Joseph Kelley out of business by breaking the law, that that was something which can't be tolerated and it should never happen again. And the way you send that message to Houston and to Wall Street and to companies like BFI—

MR. McGRATH: Your Honor, I object to the reference to Wall Street. I don't know where Wall Street comes into this case.

THE COURT: Well, we'll sustain your objection. And we'll also instruct the jury that any statement made in argument, as we've said many times, to disregard what argument there is.

MR. HEMLEY: When I say Wall Street, I don't mean, obviously, the street in New York City with that

name. What I'm trying to say is to send a message not only to BFI, but to large companies like BFI that may do business in Vermont or anywhere else in the United States. It's a chance to make that perfectly clear. Now, I'll talk about that a little bit more in just a few minutes.

First, let me talk about compensatory damages.

\* \* \*

Now, as I started to talk to you before about the other kind of damages, it's called punitive damages. And the law in Vermont gives a jury a very important power and a very important authority. Where a defendant has acted intentionally and has violated the law on purpose, the law permits a jury to deliver a message, very much like a sentencing judge, that this kind of illegal conduct will not be tolerated. And, as I said, a message that will be understood not just by BFI, but by any business who even thinks of engaging in this kind of tactic.

Now, what happened in this case and why should there be punitive damages in this case? In 1980 Joe Kelley went into competition with BFI. I'm not going to rehash the whole story, because you know it well enough.

When BFI couldn't buy him out at a truly lowball price, they tried to force him out by cutting their prices. They tried to take over the entire market so that they could, charge whatever they wanted.

You heard it from the various witnesses. They deliberately and they intentionally tried to drive Joe Kelley out. And as they said, to squish him like a bug.

And make no mistake about it, Mike Gustin, who you heard, not only through witnesses like Mowbray and Rudolph, but you also heard Butch Jones, you also heard Don Dunchus talk about the conversation in the Holiday Inn. He was the man who gave the order, and he is BFI.

And Bob Mowbray, who was BFI's man in Vermont, he did it. And this was consistent with BFI's corporate policies, the ones that were expressed in BFI's memos to regional vice presidents.



Just very quickly, to remind you, the two for one policy. "Our goal is to constantly increase both profitability and the number of customers. Under no circumstances should we have to decrease." That was John Drury.

Another memo, "If a competitor hits us hard, we must concentrate aggressively on his customers immediately."

Another memo, "In a situation like this, that is to say, when we have to cut prices, we can consider the initial short-term lower price to be an investment."

That's the way they considered this practice, an investment. And they need to be told that this is a bad investment, that they're going to lose money with this.

This is a company, the same company, which earlier told Joe Kelley when he was confronted with competition from Palisades, to cut the prices in half, drive him out of business, and then double the prices.

This is the company that sent Joe—that sent Richard Rudolph on a sales blitz. This is a company that ignored this letter from Joe Kelley's lawyer in 1982 advising them of the violation, long before we were in court.

This is the letter of which Tom Dooley, the regional vice president, the highest man in the northeast region, said, "We knew about it, but we chose to do nothing about it."

This is a company that speaks only one language, and that language is money talks. And in order for you to send them a message, send a message back to John Drury, it will have to be expressed in that language, in dollars, that's the way the law gives you the authority and the power to do it.

You people have an opportunity now to send a message back, a memo back, to John Drury that says, "If you want to do business in this state, BFI, you better play by the rules." A memo that says, "You better think twice before BFI tries to put someone else out of business just so you 'can make more money in Houston.'"

A memo that says, "The next time someone writes you a letter and complains of predatory pricing, you better

take it seriously. You better not just throw it in the trash can."

And if you send that message to Houston, you can be sure that it will get out to all of BFI's regional vice presidents and all of its offices.

Now, I'm sure you will hear BFI claim that the so-called governing officers had nothing to do with this and there shouldn't be any punitive damages. This a predictable argument. But it simply does not hold water. I have made an outline here of the points which show the knowledge, the recklessness, and the ratification by BFI on different levels.

Number one, Mowbray is BFI. He is the person with the delegated authority to set prices. They describe him as BFI's frontline management. They can't separate themselves from him now.

Number two, Gustin is BFI. He is the divisional vice president. He is the man with the lawful authority to supervise Mowbray, who has the lawful authority to set prices.

You'll hear that language about lawfully delegated authority in the Court's charge.

Drury, Thomas, Myers, and Farris are BFI. They were also officers and directors of BFI and BFI of Vermont. And they had a responsibility. It's not enough for them simply to turn their backs and say, "Hear no evil, see no evil, speak no evil. We didn't know what was going on."

BFI's highest officers ratified the acts of BFI of Vermont. You'll see, and this is Exhibit 58G, I think it is, that each year they would resolve that the official acts were ratified.

Now, it's not enough for them to say, "Well, we didn't know about the price cutting." If you believe that they didn't know about the price cutting, it's still not enough. Because they have to find out about it. BFI's policies inspired and encouraged the illegal attempt to drive Kelco

out of business. And these were the policies that I just had up on the board.

And, finally, and this is very important, BFI's highest officers recklessly disregarded the complaint from Kelco's attorneys. And as Tom Dooley, regional vice president, said, "We knew about it, but we did nothing."

They had that letter in their possession and they took absolutely no steps to investigate or stop it. It was business as usual.

Well, what about amount of punitive damages should be given in this case? What size of punitive damage award will it take to deliver a message to Houston? And I warn you in advance of even showing you this that these numbers are huge. And they're not huge because we are talking to me. We're not sending a message to me, not sending a message to you. We're sending a message to a company that grossed \$1,300,000,000 last year and predicts it will gross \$2 billion by 1990.

Now, I've done a chart here, and these numbers will speak pretty much for themselves. The company grossed \$1,300,000,000 last year. That's \$100 million every single month. That's \$25 million per week. Just since we've been here, this company has received approximately \$75 million in its treasury.

It's \$625,000 per hour. Now, I don't mean to be cute with this illustration, but to give you an idea of how big a billion is, there are 60 seconds in a minute, 3600 seconds in an hour, one million seconds in 11.5 days. One billion seconds is 31.7 years. We are talking big, big numbers.

So how do you make an impression on a company like that? Well, I have another illustration. Let's assume that a man came to you and he grossed \$20,000. And he said—he had done what this company had done. Now, of course, BFI grosses \$1,300,000,000. If you fined that man \$1,000, that would be the equivalent of a \$65 million fine on BFI. \$500, \$32,500,000. A \$200 fine, which would cer-

tainly not be too much to a man grossing \$20,000, would result in a \$13 million award.

Now, I am just putting these numbers up before you. I am not telling—I don't want you to think that I am soliciting any particular amount, because I'm not. The judge will tell you it is up to you. You have to decide what amount will be the right amount to send this message, not only to BFI, but to any other big company that even thinks of engaging in this kind of practice. And I'll leave you with one thought at this point.

We talked about \$70,000 in losses, \$70,000. \$70,000 is, if you can believe it, five one-thousandths of 1 percent of what this company earns, what this company grosses. It is the equivalent of saying to this man who makes \$20,000, "We're going to penalize you \$1.07." And they would be laughing in Houston if that's what they got. They would be chuckling to themselves about a job well done.

They would be able, every time someone accused them as Joe Kelley did, to send in a team of five lawyers and accuse us, as they did in their summation, of cooking up all the evidence.

THE COURT: I remind you, you have five minutes.

MR. HEMLEY: Thank you, your Honor.

And that is simply not acceptable.

I point again to the illustration, and I think that the numbers will speak for themselves. You'll have all of these numbers in the jury room.

I think this is a very serious case, one in which we have already determined that there was illegal conduct, deliberate illegal efforts to drive a man out of business. And I think that in this case you people have this responsibility. You have this opportunity. And I know that you will use it wisely.

This will be your opportunity to make this statement so that other businesses will learn from this experience and not just laugh at us.

Thank you.

. . . .

# **OPPOSITION BRIEF**



(2)  
No. 88-556

Supreme Court, U.S.

FILED

OCT 25 1988

JOSEPH E. SPANIOL, JR.  
CLERK

**In the Supreme Court of the United States**

**October Term, 1988**

— o —  
**BROWNING-FERRIS INDUSTRIES  
OF VERMONT, INC., AND  
BROWNING-FERRIS INDUSTRIES, INC.,**  
*Petitioners,*

**v.**

**KELCO DISPOSAL, INC., AND  
JOSEPH KELLEY,**  
*Respondents.*

— o —  
**BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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## PRELIMINARY STATEMENT

In the fall of 1982, Browning-Ferris Industries, Inc. ("BFI") and its Vermont subsidiary launched a ruthless campaign to destroy a small local competitor in the roll-off waste disposal business by predatory pricing. The evidence leaves no doubt that BFI deliberately charged prices far below its average variable cost in pursuit of the scheme. Nor can there be any question that the predatory campaign would have succeeded had it continued, despite BFI's attempt to rewrite the record. Based on these facts the jury reached two separate verdicts against BFI: attempted monopolization under 15 U.S.C. § 2, and tortious interference with contractual relations under Vermont common law.

BFI's flagrant conduct fully merits the compensatory and punitive damages the jury awarded against it. The punitive award also meets the requirements of the Eighth Amendment even if it applies, since the judgment corresponds with awards in similar cases and with criminal penalties provided by the antitrust laws. No due process objection to the award was raised or preserved below. Accordingly, there is no occasion for this Court to review either the antitrust verdict or the punitive award in this case.

—o—

## COUNTER-STATEMENT OF FACTS

BFI resorts to serious and repeated mischaracterizations of the record in its effort to obtain certiorari in this case. BFI's actual conduct simply does not match the pro-competitive rhetoric in its Petition, however. The Court is referred to the Second Circuit's decision for an accurate recital of the facts, Petition App. A, 2a-4a, but the following points must be emphasized:

1. **The evidence of BFI's anticompetitive intent was direct and unambiguous.** In the fall of 1982, BFI on at least three separate occasions ordered its Vermont manager Robert Mowbray and its salesman Richard Rudolph to put Joseph Kelley and his company\* out-of-business. C.A. App. 108-09, 120-21, 139-42; App. C, *infra*, 3a-5a. These orders were anything but "hopelessly ambiguous." Cf. Petition at 15. Here is exactly what BFI's regional vice-president told Mowbray and Rudolph: "Put [Kelley] out of business. Do whatever it takes. Squish him like a bug." App. C, *infra*, 4a. Rudolph understood perfectly well what his orders meant: predatory prices. As he said: "If it meant give the stuff away, give it away." App. C, *infra*, 5a.

BFI's regional management not only instigated the predatory campaign but charted its progress. C.A. App. 156-57, 812, 846, 848. It also knew that the Burlington operation was losing money as a result. C.A. App. 845-46, 1282-83, 1323. In fact, BFI's contemporaneous records show that its Burlington office had the worst performance in all of New England. C.A. App. 1277. Despite the fact that prices at the Burlington office clearly violated company guidelines, C.A. App. 158-59, 172-73, 1279-99, BFI never once ordered them raised. C.A. App. 225.

BFI corporate headquarters in Houston also turned a blind eye to the predatory pricing campaign. Although counsel for Kelco warned at the outset that the conduct was illegal and should be stopped, C.A. App. 1287, BFI failed to investigate the charge or even respond. C.A. App. 455-58, 1326-29, 1334, 1349-50. Instead, BFI management merely repeated its command to Mowbray:

\* Respondent Kelco Disposal, Inc. ("Kelco") is a Vermont corporation; pursuant to Rule 28.1, Sup. Ct. Rules, it has no affiliates, parent or subsidiaries.

"Put [Kelley] out of business." C.A. App. 109. For the next sixteen months, BFI attempted to do so by predatory pricing. See App. A, Table 1, *infra*, 1a; C.A. App. 1274, 1309, 1313.

2. **BFI's pricing violations were flagrant and widespread.** As BFI's own truckdriver put it, the company cut prices "dramatically . . . drastically [and] considerably" in the fall of 1982. C.A. App. 234; *see also* 442-43. As soon as Rudolph received his instructions, he dropped BFI's price on *all* new work from \$117 to \$65 per haul. C.A. App. 170, 176-77.<sup>1</sup> With some customers he went as low as \$50 per haul. C.A. App. 169-76, 1279-81. No effort was made to cover costs. In fact, Rudolph eliminated the \$20 to \$40 per haul landfill charge—the single largest variable cost component in the price—and the bin rental charge, another large variable cost. C.A. App. 174, 176, 182-83, 306-308, 1274, 1309. As he told the jury, BFI was "just undercutting to get the work." App. C, *infra*, 4a; *see also* C.A. App. 108.

BFI's \$65 price came nowhere close to its average variable cost per haul of \$104. C.A. App. 315, 1309. BFI's principal argument on this point to the Court of Appeals was that its truck and equipment costs should be classified as "fixed" rather than "variable." Petition App. A, 6a-7a; *see also* Br. of Defendants-Appellants at 21. BFI's argument ignores the uncontested evidence that roll-off trucks and bins depreciate as a function of use rather than obsolescence, as the Second Circuit noted. Petition App. A, 6a; *see also* C.A. App. 306-08, 687-88. It also disregards

1. Rudolph's testimony that 100 percent of BFI's new work was priced at \$65 or less contrasts strikingly with Petitioners' statement that BFI offered such prices only to "selected customers" totaling "approximately one-sixth of the Burlington roll-off market." Cf. Petition at 3. Of course, BFI did not drop

(Continued on following page)



common sense and economics. — P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 712.1b at 425-26 (1987 Supp.).<sup>2</sup>

BFI's \$65 price on all new jobs continued for six months, until the late spring of 1983. App. A, Table 1, *infra*, 1a; C.A. App. 226, 1274. At that point, BFI reinsti-

(Continued from previous page)

prices for customers already covered by existing contracts, since its goal was to take business from Kelco, not destroy itself. Such conduct is completely consistent with a predatory pricing campaign. See *C.E. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241, 1247-48 (5th Cir. 1985); P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 715.1b at 459-60 (1987 Supp.) BFI's own internal antitrust guidelines state, "below cost pricing can lead to serious antitrust problems. Therefore, BFI's price to any particular customer should cover all costs (including operating company overhead) of servicing that customer." (Pltf. Ex. 67, BFI Policy and Procedure Manual, § 200, p. 4 of 6).

2. In light of the testimony of Rudolph, Mowbray, and others in this case, any suggestion that BFI's conduct might be excused by good-faith cost allocations or "promotional pricing" is preposterous. Cf. Petition at 16-17. Although BFI classified truck and equipment depreciation costs as fixed rather than variable on internal documents, its own comptroller conceded that: (1) "what we include in that category is the depreciation of the truck as it is used over its lifetime," C.A. App. 687-88, and (2) BFI's internal cost classifications do not necessarily agree with generally accepted accounting principles. C.A. App. 708-09. In other words, BFI knew exactly what its costs consisted of and could have performed an average variable cost analysis had it so desired. In fact, BFI's president and chief executive officer understood the variable/fixed cost distinction well enough to testify that eliminating dump and bin rental fees would bring BFI prices below its variable cost. C.A. App. 1345.

Nor did BFI ever suggest at trial that it was engaged in "promotional pricing." Any such suggestion would have been surprising to say the least, since BFI had been in the roll-off business in Burlington for seven years and had enjoyed a monopoly for the first five. C.A. App. 426-27; 437. Cf. P. Areeda & H. Hovenkamp, ¶ 716 (1987 Supp.) (promotional pricing may be legitimate business practice for firm entering new market); *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 55 (2d Cir. 1979) (defendant was new entrant in Sunday newspaper market). Rather than relying on post-hoc explanations, BFI's counsel at trial conceded that "at least for a 6-month period of time there's no doubt [BFI] did a horrible job of pricing certain customers . . . this crazy pricing." C.A. App. 964-65.

tuted the dump fee and increased its new business price to \$97 per haul; still below its average variable cost of doing business. *Id.*; C.A. App. 315, 491-92, 1309, 1313. The \$97 price prevailed ten more months until March, 1984. App. A, Table 1, *infra*, 1a-2a; C.A. App. 304-05, 1274, 1309, 1313. All told, BFI's offering price on all new work remained below its average variable cost for a total of 16 months. Moreover, contracts BFI entered into during the predatory period continued in effect for two years or more. C.A. App. 224-27, 383, 448, 492, 343; Pltf. Ex. 102. BFI priced 1750 hauls below its average variable cost from October of 1982 through September of 1984. Those hauls comprised one-third of BFI's total roll-off revenues during the period, even though that revenue figure included amounts from legally priced contracts entered into before October, 1982 which continued in effect. C.A. App. 306, 317, 342.

**3. The results of BFI's predatory campaign were predictable and severe.** Almost immediately after BFI put its illegal prices in place, Kelco began to lose customers and market share. C.A. App. 170-76, 247; App. D, *infra*, 7a-8a.<sup>3</sup> Kelco was forced to match BFI's prices as best

3. BFI's assertion that Kelco's revenues increased and its market share remained constant during the predatory period is simply not correct. Cf. Petition at 4. The testimony of Professor Battelle established that Kelco's revenues plummeted after BFI dropped its dump fee in late October 1982 and did not stabilize until BFI re-instituted the dump fee charge in May 1983. App. D, *infra*, 7a-8a. Kelco's contemporaneous accounting records demonstrate that its revenues declined by 30 percent in the first four months of BFI's predatory campaign, from \$19,628 in October, 1982 to \$13,760 in March, 1983. C.A. App. 1235.

A more accurate picture is presented by the graph set out as Table 2 in Appendix B hereto, at 2a. As it shows, Kelco gained market share and revenues before November, 1982, and after March, 1984. During BFI's predatory campaign, however,

(Continued on following page)

it could just to stay in business. C.A. App. 445-52. For two years, it could not repair or replace equipment; it could not pay interest on loans; and some weeks it could not even make payroll. C.A. App. 459-61. By the end of 1984, the company stood on the brink of financial disaster—it had no profits, no equity in its assets, negative working capital, and sizable debts. C.A. App. 327-34. Kelco had lost \$51,000 in profits as a result of BFI's predatory pricing, C.A. App. 1197, and the Kelleys were about to lose a business in which they had invested their life savings and the equity from their home. C.A. App. 256, 333.<sup>4</sup>

Nor did BFI itself "improve the profitability of its Burlington operations," as Petitioners suggest. Petition at 4. In the first place, BFI's roll-off operations were *not* profitable during either 1983 or 1984, as its own comptroller admitted. C.A. App. 702-03; *see also* 334, 338-39. Second, BFI's "income trend" declined during the key predatory pricing period: it lost most when its prices were lowest, just as one would expect. BFI's own accounting records show an annualized loss of \$25,190.47 for

(Continued from previous page)

Kelco's revenues and market share dropped and remained depressed for almost two years. An equivalent version of Table 2 was before the jury during Professor Battelle's testimony, *cf.* App. D, *infra*, 6a-8a.

Even Table 2 does not portray the full effect of BFI's predatory pricing, however, since Kelco and BFI both had substantial and increasing revenues from contracts entered into before the predatory pricing period which continued in effect thereafter. A graph showing only revenues from *new* business obtained during BFI's predatory pricing campaign would be even more dramatic.

4. The Kelleys invested \$130,000 in the business during its first year of operation alone. C.A. App. 256-57. By the end of 1984, they had invested about \$300,000. C.A. App. 436-37. The \$75,000 investment figure cited by BFI at page 4 of its Petition represents only actual cash put in by the Kelleys in 1980. It includes neither the additional sums which they borrowed at that time nor amounts invested in subsequent years. *Id.*

the period from October 1, 1982, to May 31, 1983, when the dump fee was reinstated, as compared to an actual year-end loss of only \$5,596 for the entire fiscal year ended September 30, 1983. *Cf.* C.A. App. 1283 with 1223.<sup>5</sup>

Kelco did not begin to recover until BFI raised its prices to \$157 per haul in March 1984 and \$172 per haul in July, 1984. *See* App. B, Table 2, *infra*, 2a; C.A. App. 1274, 1313. By September 1984, Kelco showed a slight equity in its assets, even though it had not earned a profit in either fiscal 1983 or 1984. C.A. App. 329, 334.<sup>6</sup> Moreover, any slight improvement in Kelco's financial statement was due entirely to contracts it secured outside the predatory pricing period and to the fact that it deferred maintenance and did not replace equipment. C.A. App. 329-31, 332. Professor Battelle testified there was no doubt the company would have been forced out-of-business had the price-cutting continued. C.A. App. 333.

### PROCEEDINGS BELOW

Kelco sued BFI and its Vermont subsidiary on June 1, 1984 under both federal and state law. Complaint; *see* C.A. App. 1. Kelco charged that Defendants had violated section two of the Sherman Act, 15 U.S.C. § 2, by attempting to monopolize the Burlington roll-off waste disposal

5. Of course, the question of whether BFI lost money overall is beside the point, since two-thirds of its prices (and thus two-thirds of its revenues) during the period were established by contracts entered into at legal rates before the predatory pricing began or after it ended. C.A. App. 317. Profitability is not inconsistent with predatory pricing in such circumstances. *See C.E. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241, 1247-48 (5th Cir. 1985); *P. Areeda & H. Hovenkamp, Antitrust Law*, ¶ 715.1b at 459-60 (1987 Supp.).

6. Although Kelco's fiscal 1983 financial statement showed a small profit, that statement was prepared on a cash basis and did not include a deduction for accrued but unpaid interest on debt. With interest included, Kelco lost money in 1983 as it did every other year until 1985. C.A. App. 330, 334.

market through predatory pricing. It also alleged in a separate count that BFI had violated Vermont common law by tortiously interfering with existing contracts and prospective contractual relations. Kelco sought treble damages and attorney's fees under federal law, and compensatory and punitive damages under state law. *Id.*; Amended Complaint.

The district court bifurcated the trial into liability and damages phases. Following the liability phase, the jury returned separate verdicts for Kelco on each of the federal and state counts. It made clear in special interrogatories that BFI had violated each element of the attempted monopolization test and that it had injured Kelco thereby. It also found separately that BFI had intentionally and improperly interfered with Kelco's business relationships with existing and prospective customers. C.A. App. 1034-35.

Following the second phase of the trial on damages, the jury returned separate verdicts of \$51,146 on the federal claim and \$66,082.74 on the state tort claim. It also awarded \$6 million in punitive damages on the state law claim. C.A. App. 1196-97. The district court entered a judgment requiring Kelco to elect between its federal and state law remedies once the judgment became final after exhaustion of all appeals. Petition App. B, 26a-27a.

BFI's motion for judgment n.o.v., new trial or remittitur was denied by a written decision dated August 11, 1987. Petition App. B, 15a-25a. BFI appealed that decision to the Second Circuit Court of Appeals on August 28, 1987. C.A. App. 17. Kelco cross-appealed that it should be entitled to attorney's fees under federal law even if it elected its state law remedy. Petition App. A, 4a.

The Court of Appeals affirmed the decision below in all respects. It held that the evidence supported liability

on both the federal antitrust and state law claims and that the punitive award was not excessive under Vermont law or the Eighth Amendment. It also ruled that Kelco was not entitled to attorney's fees under federal law if it elected its state law remedy, an eventuality it correctly treated as a foregone conclusion. *See* Petition App. A, 12a-14a. BFI's motion for rehearing and rehearing en banc was denied June 1, 1988. Petition App. C, 28a. BFI filed its Petition for a Writ of Certiorari to the Second Circuit on September 30, 1988. Kelco has not cross-petitioned on the attorney's fees issue.

#### REASONS FOR DENYING CERTIORARI

BFI's arguments for review in this case are supported neither by the facts nor the law. BFI's claim with respect to the liability verdict is limited solely to the third element of the attempted monopolization test: dangerously probability of success. The Second Circuit applied well-established legal principles in ruling against BFI on this point. BFI's contrary arguments are simply not supported by the record. In any event, the liability verdict and damages award rest on independent state grounds which do not even require proof of a dangerous probability of success.

BFI also argues that the punitive award in this case is unconstitutionally excessive. *Cf.* Petition at 9, 20. Notably, BFI never raised or preserved any due process objection to the award. Although an Eighth Amendment claim was asserted in cursory fashion, the same concerns which guided this court in *Bankers Life and Casualty Co. v. Crenshaw*, 108 S.Ct. 1645 (1988), counsel against review in this case. Moreover, even if the Eighth Amendment applies to this civil action, the award here does not violate it. Numerous courts have awarded similar damages in economic tort actions, and the federal antitrust laws impose a



criminal fine of \$1 million for each violation, in addition to treble damages. The punitive award here is consistent with those sanctions, especially in view of BFI's size and malafides in this case. These and other considerations counsel against certiorari in this case.

**I. NO REVIEW BY THIS COURT IS APPROPRIATE WITH RESPECT TO THE ANTITRUST VERDICT IN THIS CASE.**

**A. The Second Circuit Court of Appeals Employed Well-Established Principles Of Federal Antitrust Law In Affirming The Verdict.**

The Second Circuit's decision in this case is fully consistent with the opinions of this Court and those of every circuit to consider the issue. In its most recent statement on the subject, this Court noted that "predatory pricing is an anticompetitive practice forbidden by the antitrust laws. While firms engage in the practice only infrequently, there is ample evidence suggesting the practice does occur." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 S.Ct. 484, 495 (1986); see also *id.* at 493. *Cargill* thus rejected the Government's request as amicus to dismiss as a matter of law any merger challenge based on possible predatory pricing in the future. *Id.* Similarly, this Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), declined to hold that predatory pricing could not be shown as a matter of law even where plaintiffs alleged an "economically senseless" conspiracy by Japanese manufacturers to monopolize the American television market.<sup>7</sup>

*Matsushita* and *Cargill* both hold that predatory pricing, while rare, remains a threat which will not be toler-

7. The *Matsushita* Court instead remanded the case to the Court of Appeals for consideration of whether other evidence in the record supported the claim of a predatory pricing conspiracy. *Id.* at 598.

ated under the antitrust laws. The Circuit Courts also have condemned the practice. In *C.E. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241 (5th Cir. 1985), the Fifth Circuit held that a plaintiff had presented sufficient evidence of predatory pricing to defeat a motion for summary judgment. In *D & S Redi-Mix v. Sierra Redi-Mix and Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982), the Ninth Circuit affirmed a predatory pricing verdict based on "expert testimony . . . that unlawful, anticompetitive conduct occurred." *Id.* at 1248. Commentators too have pointed out that predatory pricing is frequently used by established firms in local markets to send a warning signal to potential rivals.<sup>8</sup>

The Second Circuit in this case set forth and applied the established attempted monopolization test to Kelco's predatory pricing claim. The court required plaintiffs to show: (1) anticompetitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a dangerous probability that the attempt will succeed. Petition App. A, 5a. BFI takes issue with the Court of Appeals only on the third element of the test: dangerous probability of achieving monopoly power. See Petition at 1. However, the Court of Appeals carefully considered BFI's arguments on this point, and its decision breaks no new ground. The multi-factored approach it employed, *id.* at 7a-9a, originated with this Court in *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), and has been followed by

8. See O. Williamson, *The Economic Institutions of Capitalism*, 376-78 (1985). See also Milgrom and Roberts, *Predation, Reputation and Entry Deterrence*, *Journal of Economic Theory* 280, 304 (1982) ("The credible threat of predation will deter all but the toughest entrants"); Kreps and Wilson, *On The Chain-Store Paradox and Predation: Reputation of Toughness*, GSB Research Paper No. 551, June 1980, Stanford, California; Gerla, *The Psychology of Predatory Pricing: Why Predatory Pricing Pays*, 39 SW. L.J. 755 (1985).

the Second Circuit ever since. See, e.g., *Broadway Delivery Corp. v. United Parcel Service of America, Inc.*, 651 F.2d 122, 128-29 (2d Cir. 1981), cert. denied, 454 U.S. 968 (1981); *International Distribution Centers, Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786, 792 (2d Cir. 1987). Significantly, in *International Distribution* the Second Circuit not only refused to eliminate dangerous probability from the attempted monopolization test but reversed on grounds that the plaintiff had failed to meet it. *Id.* at 789, 791-92. There is thus no danger "that legitimate price cutting posing no danger to competition will erroneously be branded as unlawful" in the Second Circuit. Cf. Petition at 15.<sup>9</sup>

**B. The Record Evidence Leaves No Doubt There Was A Dangerous Likelihood of BFI Achieving Monopoly Power.**

**1. Kelco Would Have Been Forced From the Burlington Roll-off Market Had BFI's Conduct Continued.**

Petitioners argue strenuously that this Court should grant review because BFI could not possibly have obtained monopoly power in the Burlington roll-off waste disposal market. Petition at 13-14.<sup>10</sup> That argument flies in the

9. Other Second Circuit decisions also display a cautious approach to attempted monopolization cases based on predatory pricing. In *Northeastern Telephone Co. v. American Telephone and Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982), for example, the court reversed a plaintiff's verdict based on predatory pricing, holding that the defendant had not priced illegally and that market entry barriers were low. *Id.* at 89, 90-91. Nonetheless, not a single judge on the Court of Appeals requested a vote on BFI's petition for en banc review. See Petition, App. C at 28a.

10. BFI did not press this issue in its brief to the Court of Appeals. Its six-page discussion there of the probable success element is devoted entirely to the proposition that BFI could not have recouped losses after driving Kelco out-of-business because of low entry barriers. Br. of Defendants-Appel-

(Continued on following page)

face of extensive evidence showing that BFI: (1) had a predominant market share throughout the predatory campaign; (2) believed at the time that its predatory scheme would be successful; (3) was seriously damaging Kelco by its conduct; and (4) had the resources to continue predatory pricing. This evidence more than meets the dangerous probability test set out in BFI's own proposed jury instructions: "[a] dangerous probability of success need not mean that success was nearly certain or on the brink of being achieved. It means that the chance of success was substantial and real." C.A. App. 33.<sup>11</sup>

First, BFI controlled 55 percent of the market when the predatory pricing began and even more when it ended. C.A. App. 1218; App. D, *infra*, 7a-8a; cf. App. B, Table 2, *infra*, 2a. The leading commentator suggests that predatory pricing by a defendant with more than a 50 percent market share should be *presumed* to be an attempt to monopolize. 3 P. Areeda & D. Turner, 3 *Antitrust Law* ¶ 835c at 350.<sup>12</sup>

BFI also was confident the predatory campaign would succeed. It launched the attack with a vengeance, cutting prices below average variable costs on all new business for 16 months. Customers testified how it came back again and again to undercut Kelco's prices, and how it

(Continued from previous page)

lees at 24-30. The argument that BFI could not have destroyed Kelco in the first place is confined to two passing references in a section of the Brief dealing with intent. *Id.* at 17, 18. It is thus hardly surprising that the Court of Appeals did not "bother" to address the issue. Cf. Petition at 13.

11. BFI's proposed instructions are substantially the same as the actual charge given by the trial court. Cf. C.A. App. 985.

12. Areeda also suggests that on facts as egregious as those here it may be appropriate to dispense with the market power test altogether. *Id.* at ¶ 836, pp. 350-55. See also P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 714.2g at 436 (1987 Supp.).

bragged that Kelco "wouldn't be in business in six months anyways." C.A. App. 533, 414-416.

Kelco's business suffered severely as a result. As BFI's only competitor, it lost job after job when it failed to match BFI's predatory prices. C.A. App. 169-76, 247, 445-52. *Contrary to the statements in BFI's petition, both Kelco's revenues and market share dropped as soon as BFI cut prices, and Kelco earned no profit whatsoever during the predatory period.* App. D, *infra*, 7a-8a; App. B, Table 2a, *infra*, 2a; *cf.* Petition at 9. By the end of BFI's 16-month campaign, Kelco's financial picture could not have been worse. It had no equity in its assets; it had a negative working capital; it had no profits; and it faced substantial debts. C.A. App. 327-34.

In contrast, BFI's resources enabled it to sustain predatory prices and absorb the resulting losses. Despite the extremely poor performance of its Burlington roll-off division, C.A. App. 702-03, 1277, the company as a whole reported profits of \$145 million in fiscal 1983 and \$161 million in fiscal 1984, on sales of \$850 million and \$1 billion respectively. C.A. App. 1284-85. Moreover, BFI could shift its vast resources of equipment, personnel, and capital at will. C.A. App. 1341-43, 432-33, 513, 309.

The evidence recited above confirms what Professor Battelle told the jury: BFI's predation would have been successful had it continued. C.A. App. 333. The record shows that Kelco survived until this lawsuit was filed in June, 1984 on revenues from long-term contracts, entered into before BFI's predatory pricing began, and by resorting to desperate business measures—such as not repairing or replacing equipment and not covering payroll—which it could not continue. In these circumstances, the fact that BFI did not completely destroy Kelco hardly consti-

tutes a defense to Kelco's attempted monopolization claim. *See Multiflex v. Samuel Moore & Co.*, 709 F.2d 980, 992 (5th Cir. 1983) (inquiry must focus on "dangerous probability" at time of predatory conduct, not in hindsight).

## **2. BFI Was In A Position To Exploit Its Monopoly Power In The Burlington Market Once Kelco Had Been Eliminated.**

Kelco showed not only that BFI could *obtain* but also that it could *retain* monopoly power in the Burlington roll-off market. In affirming on this point, the Court of Appeals emphasized that such factors as strength of the competition, probable development of the industry, the nature of the anticompetitive conduct, and elasticity of demand all weighed against BFI. Petition App. A, 8a.

The trial record bears out the Second Circuit's conclusion. It demonstrates that there is no elasticity of demand among Burlington users of roll-off waste disposal services, that entry barriers to the market are high, and that the history of market suggests that BFI could keep out competitors. With respect to inelasticity of demand, Mr. Kelley, four of BFI's former employees, and a roll-off customer all testified that major construction contractors, department stores, supermarkets, and factories have no choice but to rely on roll-off services. C.A. App. 427, 92-3, 104-06, 235-37, 654, 541-42. BFI offered *no* evidence to the contrary.

On the issue of market barriers, Kelco proved that entry into the Burlington roll-off market is difficult and risky, especially given the limited rewards available. A banker experienced in the field testified that a roll-off waste disposal venture would require capital assets in the range of \$230,000 to \$290,000, together with start-up work-



ing capital of at least \$60,000. C.A. App. 401-07.<sup>13</sup> In addition, because of the limited number of customers available, he said a bank would be very reluctant to lend money if a dominant national firm had previously driven a local competitor out-of-business. C.A. App. 404-05.<sup>14</sup> The president of a local rubbish company confirmed that high entry costs have prevented him from getting into the Burlington roll-off business, despite his strong desire to do so. C.A. App. 546.

This testimony is borne out by the actual history of the market. BFI enjoyed a complete monopoly in the Burlington roll-off business before Keleo entered it in 1981. C.A. App. 427, 437. No one came in before and no one has come in since, despite the fact that BFI raised its prices by more than 150 percent, from \$65 in 1983 to \$172 in 1984. App. A, Table 1, *infra*, 1a-2a. Further, BFI offered no evidence that any competitor had ever considered entering the Burlington market or had even entered or considered entering a similar market. This case thus contrasts sharply with those decisions where numerous competitors had entered the market before, during, or after periods of alleged predatory pricing. *See, e.g., International Distribution*, 812 F.2d at 792-93; *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 824 (6th Cir. 1982); *cf. United States v. Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984) (new entrants in Dallas waste disposal market established lack of entry barriers).

13. That amount tallies with the \$300,000 which Joseph Kelley invested in of Kelco's operation. C.A. App. 436-37.

14. That testimony is consistent with the view of commentators that a history or reputation for predatory pricing, in and of itself, may be sufficient to discourage future entry. P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 711.3d at 418, n. 32 (1987 Supp.). *Cf. FTC v. Proctor & Gamble Co. (Clorox)*, 386 U.S. 568, 579 & n. 3 (1967) (presence of large company in market can raise entry barriers). *See also* n. 8, *supra*.

Notwithstanding the considerable and unrebutted evidence on inelastic demand, entry barriers, and the actual history of the market, Petitioners claim the Court of Appeals erred in concluding that BFI could have retained monopoly power in Burlington. *Cf.* Petition at 18-19. BFI suggests that the Court focussed exclusively and improperly on a "competitive" rather than a "supracompetitive" rate of return in reaching this conclusion.<sup>15</sup> However, the 10 per cent profit figure recited by the Court of Appeals and claimed by BFI to represent a competitive rate of return *in fact originated with BFI's own counsel, who told the jury that 10 percent would be a "very high" rate of return in a market where BFI enjoyed a monopoly.* As he said in his closing statement:

Now, just to put that in context, *even if you assume that somebody had all of that market and could have made a 10 percent profit after taxes, which is very high in this industry*, that is only \$20,000 to \$30,000 a year. That's the ball park we're talking about here. That's where the conduct in question happened, and that the size of what we're talking about.

App. E, *infra*, 9a (emphasis added). BFI repeated the 10 percent figure in its Brief to the Court of Appeals, despite the fact it had no basis in the evidence.<sup>16</sup> Br. of Defendants-Appellants at 36. Essentially, the court did nothing more than point out that future market entry

15. Far from focusing "solely" on the issue, *cf.* Petition at 18, the Second Circuit mentioned rates of return in only a single sentence out of three paragraphs devoted to the dangerous likelihood of success analysis. *See* Petition App. A, 7a-9a. Moreover, it made clear that all of the dangerous probability factors discussed above had been considered and that all of them weighed against BFI. *Id.*

16. In fact, BFI's own trial exhibit shows that its Burlington roll-off operation made a *before-tax* profit of only 5.8 percent in fiscal 1980, the last year in which it enjoyed a monopoly. C.A. App. 1221.

would be unlikely on BFI's own numbers. That single observation hardly constitutes error, and it certainly does not merit review by this Court.

**C. The Liability Verdict and The Damages Award Rest On Adequate And Independent State Law Grounds.**

Apart from the fact that Kelco met the "dangerous probability of success" test under federal antitrust law, it also obtained a separate state law judgment which does not even require proof of that element. BFI has not raised any challenge to that state law judgment in its Petition. Since Kelco's damages on the state law claim are \$6,066,082.74 as opposed to only \$365,938 on the federal count, Kelco will certainly elect its state remedy. Accordingly, any decision by this Court on Kelco's antitrust verdict will ultimately be advisory only. The Court should not accept review in these circumstances.

To prove its alternative state law claim for intentional interference with existing and prospective contractual relations, Kelco presented substantial evidence on the following four elements: (1) Kelco had existing or prospective business relationships with various customers; (2) BFI interfered with those relationships; (3) BFI's interference was intentional; and (4) BFI's interference was improper. That is a traditional statement of the tort, and it was expressly charged by the district court. C.A. App. 989-990. See *Williams v. Chittenden Trust Co.*, 145 Vt. 76, 80, 484 A.2d 911 (1984); Restatement (Second) of Torts, §§ 768(1), 776, 776B (1977). Contrary to BFI's assertion, *cf.* Petition at 6, the instructions on the state law claim contained *no* dangerous probability of success requirement. Moreover, BFI did not and does not challenge the law or the trial court's charge.

The only common elements between the state and federal claims are intent and the nature of BFI's pricing.

As BFI stated in its own proposed jury instruction, the question of whether BFI "employ[ed] wrongful means" or "improper" conduct in interfering with Kelco's customers is to be determined by the same average variable cost test as the federal claim. No probability of success determination is required. C.A. App. 40-41. BFI does not seek review in this Court based on either intent or application of the average variable cost test. *Cf.* Petition at I. With those two issues out of the picture, Kelco's entire judgment—including the punitive award—rests entirely on independent and adequate state law grounds.

This Court has repeatedly declined to review cases resting on independent and adequate state law grounds. As stated in *Herb v. Pitcairn*, 324 U.S. 117 (1945):

This Court from the time of its foundation has adhered to the principle that it will not review judgment of [lower] courts that rest on adequate and independent state grounds . . . And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the [lower] court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.

*Id.* at 125-26 (citations omitted). That principle has been firmly adhered to in recent terms. See *Michigan v. Long*, 463 U.S. 1032, 1037-1044 (1983); *Florida v. Meyers*, 466 U.S. 380 (1984) (per curiam).<sup>17</sup> It squarely precludes review in this case, no matter what the merits of BFI's antitrust arguments.

<sup>17</sup> As stated in *Long*, the predatory pricing cases used to shape the submission of the state law claim to the jury here were "used only for the purpose of guidance, and do not themselves compel the result the lower court[s] have reached." 463 U.S. at 1041.

## II. CERTIORARI SHOULD NOT BE GRANTED WITH RESPECT TO THE PUNITIVE DAMAGES AWARD.

### A. BFI's Conduct Fully Merits Punitive Damages.

There can be no question but that punitive damages are appropriate on the facts here. BFI solicited Kelco's existing and prospective customers with prices below its average variable cost in a deliberate, ruthless, and arrogant attempt to destroy it.

BFI's predatory campaign began in the summer of 1982, after Kelco had taken 40 per cent of the Burlington market during its first year of operation. C.A. App. 1218; *cf.* App. B, Table 2, *infra*, 2a. The local BFI division had seen pre-tax profits of \$10,635 collapse to a negative showing of \$43,607 during the same period. C.A. App. 1221. At that point, BFI offered to purchase Kelco for about half of what it was worth, and Joseph Kelley refused. C.A. App. 441-42. BFI's regional vice-president then issued his order "to squish [Kelco] like a bug." App. C, *infra*, 4a; *see also* C.A. App. 108, 120-21, 139. He bragged to customers that Kelco would not be around another six months. C.A. App. 532.<sup>18</sup>

BFI's Burlington office carried out the order in ruthless fashion. It dropped prices below variable costs on *all* jobs where it competed with Kelco and *only* those jobs. C.A. App. 170, 176-77. Covering costs was beside the

18. This was not the first time BFI management had issued predatory pricing orders. When Joseph Kelley had been in charge of the BFI Burlington operation, BFI's regional vice president Michael Verrochi told him the same thing with regard to a competitor: "he said cut the prices in half, he said drive them out of business. When they go out of business, double your prices. The way they did it some places out west . . ." C.A. App. 512.

point: "If it meant give the stuff away, give it away." App. C, *infra*, 5a; *see also* C.A. App. 108. The predatory conduct continued for 16 months. C.A. App. 1274. The Burlington manager and salesman talked about "hurting" Kelley each time they took another of his stops. C.A. App. 235. As a result of BFI's actions, the Kelleys stood to lose a business in which they had invested their life savings and the equity from their house. C.A. App. 256.

BFI's arrogance was laid bare by its refusal to investigate or even respond to Kelco's letter complaint. C.A. App. 1287, 455-58, 1326-29, 1334, 1349-50. That warning was sent to BFI's headquarters in Houston as soon as the predatory campaign began, and it was deliberately ignored. BFI's Burlington manager described exactly what happened:

Q: What further instructions did you get in response to that letter?

A: Mike Gustin [BFI's regional vice-president] told me to put him out of business.

C.A. App. 109.

In view of this refractory attitude, the jury rightly could have concluded that BFI's conduct could be changed only by punitive sanctions. The amount it awarded is completely consistent with the twin goals of punitive damages: punishment and deterrence. *Pezzano v. Bonneau*, 133 Vt. 88, 92, 329 A.2d 659 (1974). Like the common law in general, Vermont decisions require the jury to consider the defendant's financial standing as well as its mala fides in satisfying those goals. *See, e.g., Coty v. Ramsey Associates, Inc.*, 1988 Vt. Adv. Sheets 196, 546 A.2d 196, *cert. denied*, 108 S.Ct. 2903 (1988) (approving \$380,000 punitive award with respect to individual with net worth of \$3 million); *see also* Restatement (Second) of Torts, § 908



(2), comment (e) (1977). BFI's mala fides in this case are clear, and its financial resources are enormous.<sup>19</sup> The \$6 million award here represents only about .5 percent of BFI's revenues, .6 of its net worth, and less than 5 percent of its net income for the fiscal year 1986. C.A. App. 1284-86. To put the matter in perspective, the same award against a company Kelco's size which earned \$20,000 would result in punitive damages of \$1,000.<sup>20</sup> In view of BFI's conduct and size, the amount awarded here is not only an appropriate but a necessary sanction. The message it sends is entirely suitable: predatory pricing intentionally designed to destroy a small local competitor is wrong, *so don't do it*.

**B. The Constitutional Objections Asserted By BFI To The Punitive Damage Award Are Not Ripe For Review.**

This Court in *Bankers Life and Casualty Co. v. Crenshaw*, 108 S.Ct. 1645 (1988), declined on prudential

19. Indeed, BFI's size was an integral factor in its illegal conduct here. A smaller company might very well have hesitated before incurring two years of losses in order to carry out a predatory pricing campaign.

20. Although BFI suggests that considerations of size in awarding punitive damages are somehow more appropriate for small than large corporations, *cf.* Petition at 29 n. 20, BFI's executive vice-president testified on deposition that a corporation like BFI does perceive dollar sums differently from ordinary individuals:

Q: You don't settle ridiculous claims for six million dollars, do you?

A: It's conceivable.

....

Q: Does six million dollars sound a little high to you or not to pay a ridiculous claim?

A: To me as an individual.

Q: Yeah. Oh, as a company it's not that high?

A: It's not as high in respect to the company as it is to me as an individual.

Transcript of Videotaped Deposition of Stephen L. Thomas, dated January 29, 1987, at 26.

grounds to consider due process and Eighth Amendment challenges to a punitive damages award. As the opinion of the Court<sup>21</sup> noted, lower courts and the state legislatures should be given first crack at the problem:

Our review of appellant's claim now would short-circuit a number of less intrusive, and possibly more appropriate, resolutions: the Mississippi State Legislature might choose to enact legislation addressing punitive damage awards for bad-faith refusal to pay insurance claims, failing that, the Mississippi state courts may choose to resolve the issue by relying on the state constitution or on some other adequate and independent non-federal ground; and failing that, the Mississippi Supreme Court will have its opportunity to decide the question of federal law in the first instance, while any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion on the merits. We think it unwise to foreclose these possibilities, and therefore decline to address appellant's challenges to the size of the punitive damage award.

108 S.Ct. at 1651.

The instant case also fails to provide "the benefit of a well-developed record and a reasoned opinion on the merits" necessary for constitutional review. BFI gave the lower courts no real opportunity to address these issues. *No due process or other Fourteenth Amendment objection to the punitive award was ever raised.* At trial, BFI merely recited the traditional common law standards for punitive damages in its own proposed jury instructions, in stark contrast to the numerous tests set forth

21. Although the *Bankers Life* Court issued a plurality opinion, six justices agreed that consideration of the constitutional issues was not appropriate as a prudential matter. Justice White concluded that review was unavailable as a matter of law. Justices Stevens and Kennedy did not participate.

in its Petition. C.A. App. 1047-49; *cf.* Petition at 25-27. Nor did BFI voice any objection when the traditional standards were actually charged.<sup>22</sup> Eighth Amendment concerns were mentioned only in a brief sentence in BFI's 59-page post-trial memorandum, and discussion was confined to a footnote in the Court of Appeals Brief. *See* Mem. In Support of Defendants' Motion For Judgment Notwithstanding The Verdict, at 55-56; Br. of Defendants-Appellants at 37. Given BFI's cursory treatment of the point, neither the courts nor Kelco could respond meaningfully.

Review of BFI's Eighth Amendment arguments now would also frustrate the other less-intrusive solutions suggested by *Bankers Life* only five months ago. There is evidence that these suggestions are already beginning to take root. For example, the Georgia Supreme Court in *Colonial Pipeline Co. v. Wright Contracting*, 258 Ga. 115, 365 S.E.2d 827 (1988), *appeal dismissed*, 57 U.S.L.W. 3228 (Oct. 3, 1988), has reversed a punitive damages award on state constitutional grounds. In addition, at least 15 states have enacted legislation addressing punitive awards, some very recently.<sup>23</sup> *See, e.g.*, 1988 Kan. Sess. Laws Ch. 209, HB 2731 (punitive damages limited to lesser of net worth or \$5 million); Ala. Code §§ 6-11-20 to 6-11-30 (1987) (punitive damages limited to \$250,000); Va. Code §§ 8.01-38.1 (1987) (punitive damages limited to \$350,000).

22. BFI's failure to raise Eighth Amendment objections to the punitive damages charge at trial raises serious questions as to whether it may now challenge that charge on appeal. *See Corriz v. Naranjo*, 667 F.2d 892 (10th Cir. 1981) *cert. dismissed*, 458 U.S. 1123 (1982); *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975); *cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (Brennan, Marshall and Stevens, JJ., dissenting) (1981).

23. *See* Ghiardi and Kircher, *Punitive Damages*, Table 4-1, at 26-30 (Supp. 1986); *Liability Week*, June 29, 1987, at 12.

In view of these developments, Petitioners' assertion that the constitutional issues surrounding punitive damage awards should be reviewed in this case is at the very least premature. If alternatives are to be explored and a consensus developed, surely more than five months must elapse. That consideration, coupled with BFI's failure to develop an adequate record, counsel against a grant of certiorari in this case.

### C. The Punitive Award Does Not Violate The Excessive Fines Clause of The Eighth Amendment.

Even assuming the Eighth Amendment applies to this civil action—a position no court has embraced<sup>24</sup>—the award here fully complies with its strictures. The damages in this case are consistent with punitive awards for economic torts in other jurisdictions and with criminal sanctions under the antitrust laws. In view of the gravity of BFI's conduct and its financial resources, the penalty meted out by the jury is entirely appropriate.

The Eighth Amendment stands for a fundamental principle: the punishment must fit the crime. *Solem v. Helm*, 463 U.S. 277, 284 (1982). However, as *Solem* made clear, "successful challenges to the proportionality of particular sentences will be exceedingly rare." *Id.* at 290-91. For example, this Court has held that the proportionality principle does not require reversal of a 40-year prison

24. This Court "has had no difficulty finding the Eighth Amendment inapplicable" where civil defendants have claimed that it reached beyond the criminal process. *Ingraham v. Wright*, 430 U.S. 651, 667-68 (1977), *citing Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (deportation) and *Uphaus v. Wyman*, 360 U.S. 72 (1959) (incarceration for civil contempt.) Circuit Courts have reached the same conclusion. *Miller v. Cudahy Co.*, Nos. 87-1502, 2283 (10th Cir. Sept. 28, 1988); *Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir.), *cert. denied*, 389 U.S. 853 (1967); *United States v. Strangland*, 242 F.2d 843, 848 (7th Cir. 1957).

sentence for possession and distribution of nine ounces of marijuana. *Hutto v. Davis*, 454 U.S. 370 (1982). Nor does it prevent a life sentence for obtaining \$229.14 by false pretenses, a fraudulent credit card, and a forged check. *Rummel v. Estelle*, 445 U.S. 263 (1980). Significantly, this Court has never held any criminal or civil fine unconstitutional under the Eighth Amendment.

Applying the proportionality principle to the punitive award in the instant case presents serious practical problems. BFI is a corporation whereas all other defendants alleging disproportionate punishment have been individuals; BFI is a civil defendant whereas all other such defendants have been criminal defendants; and BFI has been ordered to pay money whereas all other defendants faced death or imprisonment. Nevertheless, to the extent comparisons may be drawn, *Solem* and other cases strongly suggest that the punitive damage award against BFI is not unconstitutional under the Eighth Amendment.

The *Solem* Court considered both the gravity of the offense and penalties for similar acts in determining whether a prison sentence was proportional to the crime. With respect to the gravity of the offense, it found that Helm's crime—uttering a bad \$100 check after six non-violent felony convictions—was relatively minor. Helm's penalty of life imprisonment without parole, on the other hand, was the "penultimate penalty." 463 U.S. at 303. The only harsher penalty is death. *Id.* at 297. In contrast, BFI has been deprived of neither life nor liberty. Its punishment is not only less harsh than Helm's life sentence but also Rummel's life sentence and Davis's 40-year sentence, both of which this Court affirmed. Moreover, whereas Helm passed a bad \$100 check, Rummel

fraudulently obtained \$230 and Davis sold nine ounces of marijuana, BFI in effect stole \$51,000 from Kelco and, worse than that, set out to destroy Mr. Kelley's livelihood in violation of long-established national economic policy.<sup>25</sup>

The *Solem* Court also considered sentences imposed for similar acts in South Dakota and in other jurisdictions. It determined that Helm had been treated at least as harshly as other criminals in South Dakota who had committed murder, treason, arson and kidnapping. *Id.* at 298-99. It also found that in only one other state could Helm have even arguably received as severe a sentence as he did in South Dakota. *Id.* at 299-300. In contrast, while approximately 15 states bar or substantially limit punitive damages,<sup>26</sup> in a majority of states BFI could have been punished at least as severely as it was in Vermont. Moreover, as the Court of Appeals pointed out, the award here jibes with punitive damages which actually have been levied against large corporations elsewhere for other economic torts. See cases cited at Petition App. A, 11a.<sup>27</sup>

25. BFI aggravated the crime by continuing its predatory campaign despite a specific warning at the outset that it was illegal, even though its own internal guidelines require investigation of all such complaints. See C.A. App. 1287 (letter to BFI, Oct. 26, 1982); Pltf. Ex. 67, BFI Policy & Procedures Manual, § 150.

26. See n. 23, *supra*.

27. BFI attempts to make much of the difference between the \$6 million punitive and the \$51,000 compensatory award in this case. However, the Eighth Amendment principle of proportionality looks to the relationship between the punishment and the crime, not punitive and compensatory damages. Attempted monopolization is precisely the type of offense where provable damages are likely to be low, so that punitive awards are especially necessary to deter the practice.



The punitive award here also is not out-of-line with criminal penalties for corporations which violate the antitrust laws, despite BFI's protestations to the contrary. *Cf.* Petition at 27-28. Not only does the federal antitrust statute impose treble damages, it also imposes payment of a \$1 million fine and a maximum prison term of three years. 15 U.S.C. § 2.<sup>28</sup> The fine was last increased fourteen years ago, from \$50,000 to \$1 million, at the same time the crime was reclassified from a misdemeanor to a felony. *See* Antitrust Procedures and Penalties Act, Pub. L. 93-528, § 3, 88 Stat. 1708 (1974). As the House Report emphasized even then:

The last time these fine provisions were increased was in 1955. Near unanimous witness's testimony<sup>29</sup> was received during hearings that revisions upward were long overdue. Indeed, some witnesses testified that fine ceilings sought were still too low since profits from antitrust violations can run into billions of dollars; and since, by comparison, the Common Market mandates fines for antitrust violations in amounts up to 10% of the gross annual sales volume of the defendant. Later during the same day that your committee approved the bill, President Ford called upon the Congress to increase fines for antitrust violations by corporations to \$1 million.

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28. In fact, BFI has been assessed criminal fines under the federal antitrust laws at least twice in the past six years. In *U.S. v. Browning-Ferris Industries, Inc.*, No. CR87-780 (N.D. Ohio, Oct. 23, 1987), a \$1 million fine was imposed against BFI, and in *U.S. v. Browning-Ferris Industries, Inc.*, No. CR80-136-02 (N.D. Ga., Dec. 29, 1982 and Feb. 23, 1983) a \$350,000 fine was ordered. In the latter case, a prison sentence also was imposed.

29. Witnesses included the Deputy Assistant Attorney General for the Antitrust Division, the former chairman of the Federal Trade Commission, and spokespersons for industry and bar association groups.

The bottom line is that the punitive damages award in this case meets Eighth Amendment standards even if such standards apply. Punitive damages are the best protection local companies like Kelco have against large, nationwide predatory firms like BFI, which not only have the resources but the will to destroy competition by predatory pricing. Because the reputation gained by such conduct has nationwide benefits to the predator,<sup>30</sup> the punitive award here is both appropriate and well-considered. This Court should not review it.

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30. See footnotes 8, 14 and 18, *supra*.

**CONCLUSION**

The Court of Appeals affirmed the jury verdict in this case based on clear-cut violations of federal and state law. BFI's attacks on the antitrust verdict simply are not supported by the record. Moreover, both the liability verdict and damages award rest on independent state law grounds. BFI's Eighth Amendment claim with respect to the punitive award is both premature and legally unsound. No due process argument was raised or preserved below. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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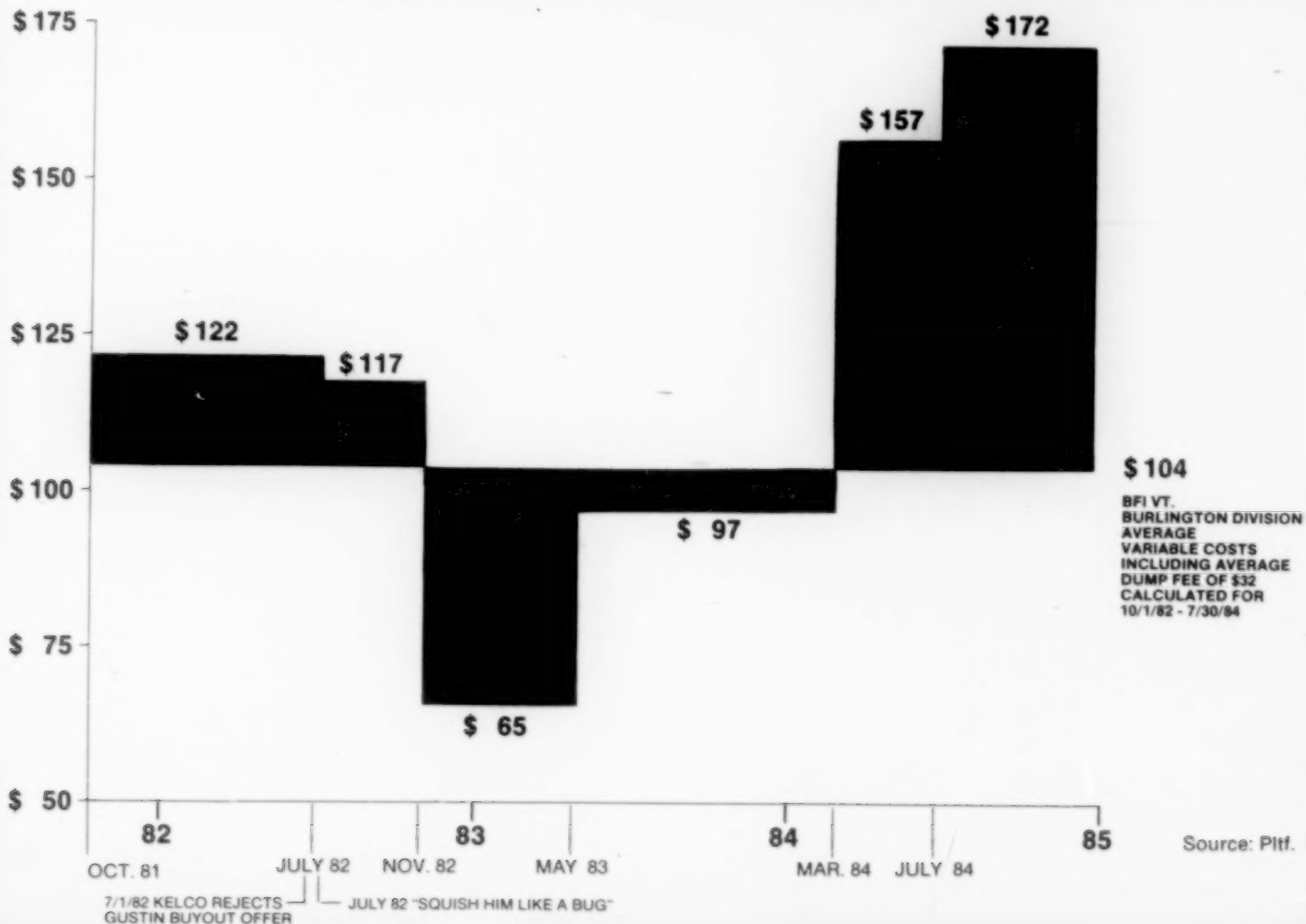
*Attorneys for Respondent*

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APPENDIX A — Table 1

# BFI VT. BURLINGTON DIVISION PRICES COMPARED TO AVERAGE VARIABLE COSTS

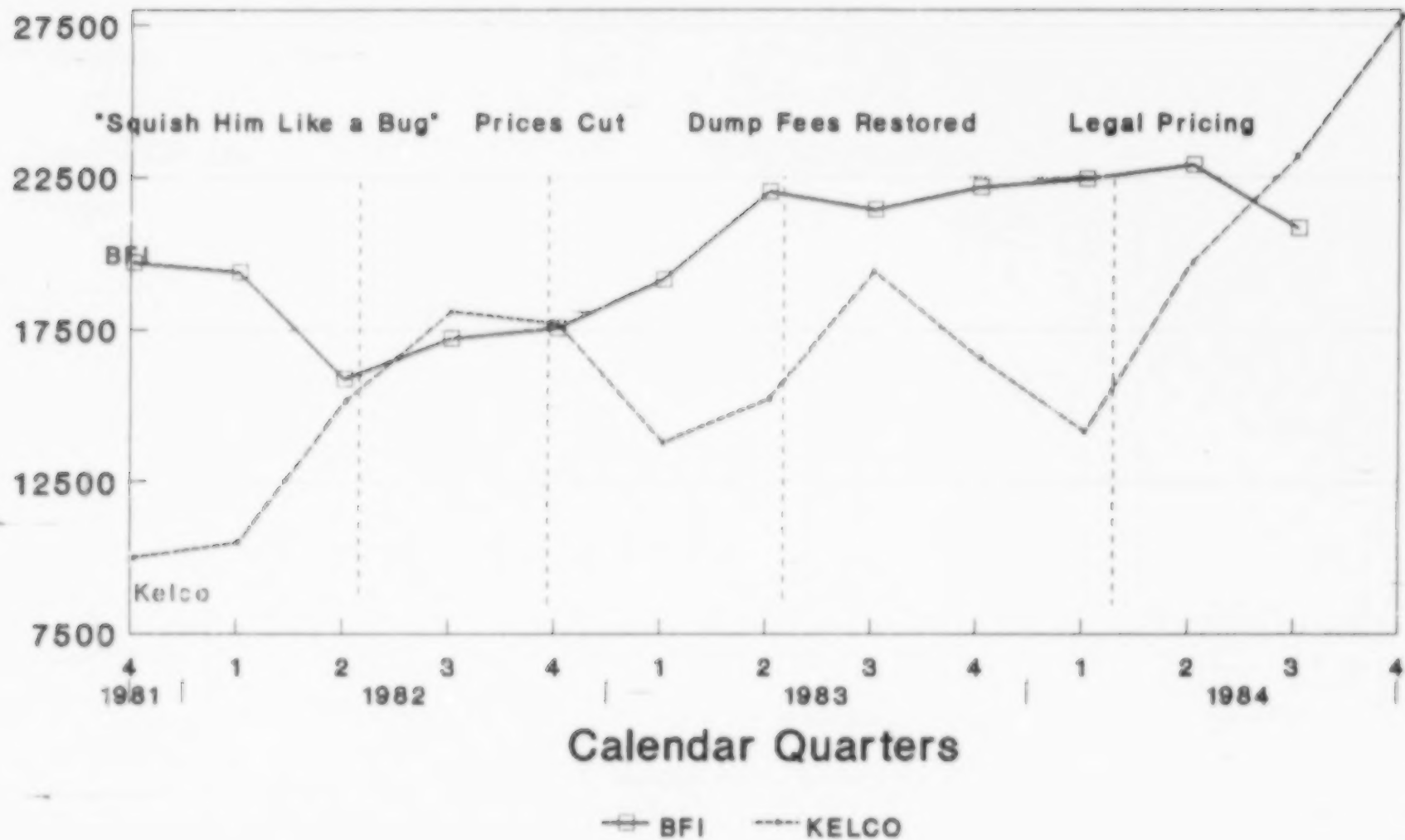




## APPENDIX B — Table 2

# Kelco v. BFI

## Average Quarterly Revenues: 9/81 - 12/84



Sources: Kelco, C.A.App. 1226, 1230, 1235, 1239, 1244; BFI, C.A.App. 1221, Exs. 9-11  
To Deposition of Peter Battelle, 2/19/86

**APPENDIX C**

Direct Testimony of Richard Rudolph  
C.A. App. 164-167

\* \* \*

(p. 164) Q Now, did there come a time in 1982 when you were instructed to lower your prices on new roll-off business that competed with Kelco?

A Uh-huh. Yes.

Q And who gave you that direction originally—directive?

A Bob Mowbray.

Q Did he explain to you where he'd gotten the instructions from?

A Yes.

Q What did he tell you?

A Mike Gustin.

Q Did you go about reducing your prices at that time?

(p. 165) A Yes, I did.

Q And how did you go about doing that?

A Did a quick market survey to find out what Joe's prices were at that given point. And then we'd just go in, and sometimes you'd just go up to a job site and ask the contractor where he got the box, how much he paid for it. And they'd generally tell you. Take this information and then just start soliciting Joe's accounts.

Q And you would just undercut?

A Try to match the price. And if that didn't work, go underneath the price.

Q When you went underneath Joe's price, did you ever give any thought to whether or not the account would be profitable for you?

A After a while, no. I mean, I—you know what your prices are.

Q But, I mean, was that a concern of yours, whether or not a particular job that you undercut would deliver a profit—

A No.

Q —or were you just undercutting to get the business?

A Just getting the work.

Q Did there come a time when you actually met with Mike Gustin on—up in Burlington?

(p. 166) A Yes.

Q And where was that meeting?

A Well, he came to the office. And then we went to—I believe it was the Holiday Inn. I'm not 100 percent sure, but that's generally where we would go.

Q Okay. And can you report, please, to the jury, as best you can recall, what the discussion was that you had with Mr. Gustin on the subject of competition from Kelco and what your response ought to be?

A Put him out of business. Do whatever it takes. Squish him like a bug.

Q Did he use those words?

A Yes, sir.

Q And did you continue to follow your practice of undercutting when necessary?

A Yes. Yes, I did.

• • •

(p. 167) Q Tell us . . . what it was that Mr. Gustin said at that Holiday Inn meeting on the subject of price cutting.

A Do whatever it took. Put him out of business.

Q What did you understand that to be?

A If it meant give the stuff away, give it away.

Q Do you remember—who else was at that meeting, by the way?

A Mr. Mowbray.

• • •



## APPENDIX D

Direct Testimony of Peter Battelle  
C.A. App. 321-323

(p. 321) BY MR. HEMLEY:

Q Mr. Battelle, I'll move this over to the easel and ask you if you can just tell us what these figures represent and how you calculated them.

A Okay. What I have tried to generally depict here is the price movements—excuse me, . . . the total revenue earned on a monthly basis by BFI and by Kelco over the period we have been talking about, which is October 1, 1981 to October 1, 1984, and thereafter.

And I have divided the chart into three or four segments here. This segment up to this yellow line is called a normal situation. Then this is the period that BFI dropped their prices to sixty-five dollars, and this is the period that BFI reinstated the dump fee. In other words, it was sixty-five and then they added the thirty-two dollar dump fee.

And this is the period after the spring of 1984 when BFI returned to normal pricing and even higher pricing than they had back in the early period of time.

I call this period, this first year, October 1, '81, to October 1, 1982, kind of a normal situation, where, where there's no problem. BFI's monthly sales were dropping.

Q Before, before we get too far, let me just ask you to tell us where you got the, the numbers which form the basis for this, this chart, so we know that.

A Okay. The numbers for BFI come off their monthly (p. 322) departmental expense reports. In other words, these are BFI's sales per their internal reports on a month-by-month basis, from October 1981.

Kelco's figures come off their monthly reports, which were prepared by Muriel Kelley monthly, summarizing the amount of revenue that they earned from their roll-off business.

Q Okay.

A All right. So BFI's sales per month, and this, there's fluctuations here. I have kind of drawn a general trend line. In other words, it might be something like this. But this point and this point is accurate. BFI's sales dropped from this point down to this point, from October of '81 to October of '82.

Kelco had started business in '80 and their sales were increasing, as shown by the green, green line here. So at this point in '82, for that particular month, Kelco's sales had surpassed BFI's.

At the point the prices were cut, BFI began to increase their monthly revenue. Despite the fact they cut prices there, their monthly revenue went up, which would mean that they would have gained a substantial amount of new business or new jobs.

Kelco felt that, that pressure, if you will, and their, their monthly sales dropped, so this is a period October 1 of '82 to approximately May of 1983.

(p. 323) At this point BFI began to increase their prices again. Again they reinstituted the dump fee. BFI's

monthly revenue then remained relatively flat from May, approximately May of 1983, on into the end of fiscal 1984.

At this point BFI's charges were still below their average variable costs. Kelco was still feeling the impact and their sales declined during this period as well.

And finally, when BFI increased their prices further, to one fifty-seven, to one seventy-two, we were talking about, Kelco's sales then began to increase rather dramatically; in other words, back when, when prices returned to, more to a normal situation. BFI's again remained relatively flat during the period.

So to sum up, the situation was BFI, sales were dropping; Kelco's were increasing. BFI drops their prices, the result is Kelco sales go down, BFI's go up. And then as BFI raises their prices, Kelco begins finally to recover. BFI's sales are relatively flat during that period.

Q And just to take it all together, how does that relate then to your conclusion that the lost business that Kelco suffered was a consequence of the price drop that BFI imposed?

A I think the graph pretty clearly depicts that during the period that BFI dropped prices, Kelco's sales dropped.

• • •

## APPENDIX E

Excerpt from Closing Argument  
of J. Paul McGrath  
at Damages Trial  
C.A. App. 1169-70

• • •

(p. 1169) As a matter of fairness, if you look at where the parties have ended up here, Kelco has succeeded. BFI is out of business and Kelco is getting whatever damages they are entitled to. Obviously, you decide what they're entitled to.

The amounts make sense. This market, after all, was a small geographic area where Mr. Mowbray operated. The total revenues in any given year were \$400,000 to \$500,000. Little bit less in the beginning, around 500 in the last year.

Now, just to put that in context, even if you assume that somebody had all of that market and could have made a 10 percent profit after taxes, which is very high in this industry, that is only \$20,000 to \$30,000 a year. That's the ballpark we're talking about here. That's where the conduct in question happened, and that's the size of what we're talking about.

Did things happen that shouldn't have happened? You obviously, have found that they did. There, obviously, (p. 1170) was some pricing that was, at the very least, unwise. And you have found it was below average variable costs. . . .

• • •

**REPLY**

**BRIEF**



No. 88-556

Supreme Court, U.S.

FILED

NOV 1 1988

JOSEPH F. SPANOL, JR.  
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., AND  
BROWNING-FERRIS INDUSTRIES, INC., PETITIONERS

v.

KELCO DISPOSAL, INC., AND JOSEPH KELLEY, RESPONDENTS

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for  
for the Second Circuit

## REPLY BRIEF FOR THE PETITIONERS

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## REPLY BRIEF FOR THE PETITIONERS

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### I. THE PREDATORY PRICING ISSUE

We argued in the petition (at 10-19) that the court of appeals applied a seriously flawed legal standard in concluding that BFI engaged in unlawful predatory pricing. The court of appeals' test conflicts with decisions of this Court and of other courts of appeals, as well as with academic commentary concerning predatory pricing. Indeed, because it allows competitive pricing to be branded as predatory pricing, the court of appeals' test is itself likely to deter legitimate price competition.

Respondents do not even attempt to reconcile the court of appeals' legal reasoning with this Court's decisions addressing the standard for proof of predatory pricing, nor do they deny that there is a conflict among the courts of appeals regarding the issue presented in the petition.<sup>1</sup> Respondents instead argue that this Court should not review the court of appeals' determination for two reasons wholly unrelated to the correctness of the legal rule applied below. First, they assert that the jury verdict in this case would have been upheld even if the court of appeals had utilized the correct legal standard. Second, they contend that the court of appeals' decision rests upon an independent state-law ground.

We show below that both of respondents' contentions are wrong and, moreover, rest upon blatant misstatements regarding the record in this case. But even if they had more force, respondents' arguments would provide little reason to deny certiorari. The possibility that the ultimate outcome would not change under the correct legal rule does not render the decision below any less

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<sup>1</sup> Indeed, respondents' own brief reveals the deficiencies in the court of appeals' analysis: in arguing that the record shows that BFI's conduct would have forced Kelco out of business, respondents are unable to cite the court of appeals' opinion even once in support of their factual contentions, because that court did not consider the issue.



significant. To the contrary, if the court of appeals' decision is not corrected, it will have substantial repercussions in subsequent cases presenting the same legal question. This Court should exercise its certiorari jurisdiction to prevent that result.

A. Respondents' principal argument is that even if the court of appeals had applied the correct legal standard, it would nevertheless have concluded that BFI attempted to monopolize the Burlington roll-off market. Of course, BFI is entitled to have its appeal decided on the correct legal standard.<sup>2</sup> Moreover, respondents' contention is based on numerous factual misstatements. Space limitations compel us to confine our rebuttal to only a representative few of these factual errors.

1. Respondents rest much of their defense of the jury's verdict upon the repeated assertion (*e.g.*, Opp. 3, 5, 13) that BFI set its price at predatory levels for 16 months, not for only 6 months. They fail to point out that this claim finds no basis in the decision of the court of appeals, which held only that BFI's prices were predatory for the six months when they were offered at the \$65 level. The court did not address, let alone sustain, respondents' claim that the \$97 price that BFI charged some customers during the ensuing ten months also was predatory. (That claim was based on the manifestly untenable theory that BFI's management, selling, and national overhead costs should be classified as *variable costs*.) See Pet. App. 7a.<sup>3</sup>

<sup>2</sup> Respondents somewhat halfheartedly, but mistakenly, assert (Opp. 12-13 n.10) that BFI failed to raise in the court of appeals the contention that respondents were required to prove that BFI's conduct could have driven Kelco out of the market. But BFI did raise the argument, relying upon this Court's decision in *Cargill* and *Matsushita* (Br. 14-18), and a portion of its brief was headed "There Is No Evidence That BFI Priced With the Intent or Probable Effect Of Driving Kelco Out of Business" (Br. 16 (emphasis added)).

<sup>3</sup> Respondents suggest (Opp. 14-15) that the effect of BFI's conduct cannot be measured by looking to the length of time for which

2. Respondents err in arguing (Opp. 13) that BFI's low prices "seriously damag[ed]" Kelco. The evidence shows that Kelco's revenues and profits during the six-month period were *greater* than those that it earned during the same period in the previous year. See C.A. App. 1230, 1235. And Kelco showed a profit in fiscal year 1983—which included the six-month period in which BFI charged low prices—whereas it had posted a loss the previous year. C.A. App. 1260, 1269.<sup>4</sup> Indeed, so far was Kelco from the economic intensive care unit that it actually increased its working capital by approximately \$25,000 during fiscal year 1983 and was able to purchase new equipment during fiscal year 1984. C.A. App. 1270, 522-523.

True, Kelco's revenues and profits did decline immediately after BFI began offering some customers the \$65 price in October 1982, but that decline cannot be attributed to BFI's prices. Respondent's own chart and the exhibits on which it is based (*see* Appendix B, Opp. App. 2a) show that Kelco's revenues declined every year at this time. Because a large proportion of Kelco's business was serving construction sites, it stands to reason that revenues would decline during the Vermont winter, when most construction activity is suspended. C.A. App. 789-790. Respondents' comparison of summer revenues with winter revenues is disingenuous. Perhaps Kelco would have done even better if BFI had maintained higher prices, but the true picture painted by the trial record is nevertheless one of a company steadily improving its position.

low prices actually were charged. But, as *Matsushita* teaches, the probability that conduct would produce a monopoly must be assessed on the basis of what actually happened, not a hypothetical version of events that might have produced different results.

<sup>4</sup> Respondents contend (Opp. 7 n.6) that Kelco did not actually earn the profit reported in its fiscal 1983 financial statement because the statement failed to include a deduction for unpaid interest on debt. This "interest" was due on funds owed by Kelco to its shareholder, respondent Kelley, and is economically indistinguishable from a dividend.

By the same token, the evidence regarding BFI's financial condition does not reveal the decline in revenue and profitability that would be the expected product of a predatory pricing campaign. Quite the contrary: as respondent's own Appendix B (Opp. App. 2a) shows, BFI's revenues steadily increased following the institution of the allegedly predatory prices; at the same time, its expenses held relatively steady. Thus, BFI's losses from the Burlington roll-off operations actually declined from \$17,800 in fiscal 1982 to \$5,600 in fiscal 1983. C.A. App. 1223.

3. Respondents misrepresent the record in attempting (Opp. 17) to defend the court of appeals' analysis regarding the existence of barriers to entry. We contended in the petition (at 18-19) that the court of appeals erred by failing to hypothesize a supracompetitive rate of return on investment in considering whether other competitors would be likely to enter the market to challenge a monopolist. Respondents argue (Opp. 17) that the 10% figure used by the court of appeals did constitute a supracompetitive rate of return, but they cite absolutely no evidence to support that contention. The statement of BFI's counsel to the effect that 10% return on revenue would be a "high" rate of return (C.A. App. 1169)—made at the damages stage of the trial, after the jury had already found liability—provides no support for the contention that a monopolist's supracompetitive profits would not exceed a 10% return on investment.

B. Respondents also argue (Opp. 18-19) that review by this Court is not warranted because the court of appeals' decision rests on an independent and adequate state-law ground. Of course, the independent and adequate state ground doctrine does not directly apply here because the judgment under review was rendered by a federal court, not a state court. Respondents' argument appears to be that this Court should decline to review the federal antitrust determination as a prudential matter because—even if the Court were to reverse on that issue—respondents would remain entitled to judgment on the state tort claim.

The basic difficulty with this argument is that the decision below indisputably does *not* rest on any independent state ground. In fact, the court of appeals did not resolve the dispute between the parties about Vermont law.<sup>5</sup> Since that court concluded that BFI was liable under the federal antitrust laws, there was no need for it to determine whether the Vermont tort imposes liability for conduct that is lawful under the federal antitrust laws (a ruling that might give rise to a serious preemption issue).

Far from resting upon independent state-law grounds, therefore, the court of appeals' state-law determination actually rests *solely* on federal grounds: the finding that BFI violated the Sherman Act provided the proof of improper conduct relied on to establish the Vermont tort. Reversal by this Court of the federal antitrust determination would thus *require* vacation of the state-law determination to permit the court of appeals to consider the scope of the state law tort. For that reason, the portion of the judgment relating to BFI's liability under Vermont tort law clearly does not rest on independent grounds.<sup>6</sup>

<sup>5</sup> In making this argument, respondents claim that the scope of the state tort is undisputed. This completely misrepresents BFI's position. BFI has always contended that Kelco could recover damages under Vermont law *only* if it established that BFI's pricing violated the federal antitrust laws. Thus, respondents' extremely misleading quotation from BFI's proposed jury instruction (Opp. 19) omits the key sentence of the proposed instruction: "The defendants have not improperly interfered with the continuing business relationships of Kelco Disposal, Inc. unless you have concluded that their prices were such as to render them liable to plaintiff under § 2 of the Sherman Antitrust Act." C.A. App. 41; see also *id.* at 1009-1010. BFI adhered to this position in the court of appeals. See Op. Br. 13; R. Br. 3-4. Respondents' assertion (Opp. 18) that "BFI did not and does not challenge the law" is thus patently false.

<sup>6</sup> On the merits, there is little substance to respondents' assertion that Vermont would impose liability for conduct that is permissible under the federal antitrust laws. See *Restatement (Second) of Torts* § 768, comment f (1979) (federal antitrust standards provide



## II. THE PUNITIVE DAMAGES ISSUE

A. At the heart of our argument on punitive damages is the objection that the award here—\$6 million for a short-lived predatory pricing scheme that caused \$51,000 of actual damages—bears no rational relationship to any proper criterion for punitive damages, being justified almost exclusively on the basis of BFI's wealth. Respondents make no claim that the award is reasonably proportioned to Kelco's injury or to BFI's potential gain from its alleged wrongdoing, and they do not deny that it is 20 times the size of any previous Vermont punitive damages award. Rather, they simply assert (Opp. 20-21) that BFI's conduct was unusually villainous and BFI's pocket unusually deep.

Respondents appear to forget that the effort to drive a competitor out of business, far from being a grave aggravating factor specially justifying a mammoth fine, is one of the essential elements of the predatory pricing tort, without which there would be no liability even for compensatory damages. Moreover, as just discussed, this was not a particularly serious instance of predatory pricing: true, prices were lowered, but BFI actually had increased revenues and profits during the period of low prices, and Kelco's profits also increased (though perhaps less than would have happened if BFI had consistently maintained higher prices). In fact, BFI's price-

guidance for determining whether interference with business relations is improper where tort claim is based upon alleged restraint of trade). Even respondents agree (Opp. 18-19) that federal predatory pricing standards govern the question whether the "nature of BFI's pricing" was improper under Vermont law. However, they mistakenly assume that any pricing at a level lower than average variable cost constitutes anticompetitive conduct under federal law. In fact, as this Court made clear in *Cargill*, 107 S. Ct. at 495 n.17, the relationship between prices and costs is not the sole criterion: prices may be classified as "predatory," and therefore anticompetitive, only if a below-cost pricing strategy was likely to succeed in gaining a sustainable monopoly.

cutting more closely resembles the kind of vigorous price competition federal law promotes than the "ruthless" and "arrogant" unlawful conduct respondents portray.

B. Respondents next suggest (Opp. 22-25) that the issue of whether and how the Excessive Fines Clause applies to the infliction of punitive damages in civil cases is not ripe for determination by this Court. They contend that this Court said as much in *Bankers Life*, that BFI somehow failed to preserve the point by not making a more extended constitutional argument below, and that consideration of the Eighth Amendment issue is unnecessary because the problem will be dealt with satisfactorily by state legislatures.

1. The passage quoted (Opp. 23) from the plurality opinion in *Bankers Life* is taken out of context and does not mean what respondents suggest. *Bankers Life* was a case in which the Eighth Amendment issue had not been properly preserved in the Mississippi courts. The quoted passage was addressed to whether review was prudent in that particular case in light of "the policies that animate the 'not pressed or passed or passed upon below' rule" (108 S. Ct. at 1651). It simply does not speak to the question whether the Court should exercise its discretion to review a properly preserved constitutional claim. Indeed, the reasons given in the quoted passage for declining to reach the question in *Bankers Life* would have made little sense if the federal claim had actually been considered and rejected by the lower court.

2. Notwithstanding respondents' insinuations to the contrary (Opp. 23-24), there is no comparable defect in this case. BFI explicitly raised the Excessive Fines Clause issue at the earliest opportunity below,<sup>7</sup> and its

<sup>7</sup> As respondents acknowledge (Opp. 24), BFI invoked the Eighth Amendment in its Motion For Judgment Notwithstanding The Verdict. Respondent imply (Opp. 24 n.22) that BFI should have raised the issue even earlier, before the jury reached its verdict, but they do not explain how BFI could have objected to the size of the verdict before it was rendered. Respondents' argument would render excessive punitive damages awards immune from constitu-



contention was considered and expressly rejected by the court of appeals (Pet. App. 11a-12a). This was surely sufficient to preserve the constitutional issue for this Court's review.<sup>8</sup>

3. The fact that some state legislatures have perceived a need to take action to curb the manifest abuses arising from cases like the instant case is not, contrary to respondents' suggestion (Opp. 24), a reason to withhold review here. It is naive to suppose that legislative action will make the issue disappear,<sup>9</sup> and respondents have offered no other reply to our contention (Pet. 20, 24) that the problem of huge punitive damages awards is in fact a growing—not to say exploding—one that is causing increasing dislocations in the way both business and litigation are conducted in this country.

C. Respondents next make the startling assertion (Opp. 25-29) that the \$6 million award of punitive damages in this case "is entirely appropriate" and proportional to BFI's "offense." Their argument, boiled down to its essentials, is that the enormous penalty is not unconstitutional because "BFI has been deprived of neither life nor liberty" and because the penalty is not out of line with criminal and civil penalties that could be or have been imposed in other cases.<sup>10</sup>

tional review because they cannot be anticipated. That twisted and anomalous result cannot be the law.

<sup>8</sup> Contrary to respondents' assertion (Opp. 24), BFI did not raise the Eighth Amendment argument solely in a footnote. See BFI Ct. App. Br. 37. In any event, in this case the Eighth Amendment point could be stated succinctly because it followed a more extended discussion attacking the disproportionality of the punitive award and arguing that this required a remittitur under Vermont law.

<sup>9</sup> However, the possibility that state courts or legislatures will address the constitutional problems inherent in punitive damages would be greatly enhanced if the Court were to strike down one particularly excessive award (such as this one) on constitutional grounds.

<sup>10</sup> Respondents also imply (Opp. 26) that the Excessive Fines Clause is inapplicable here because BFI is a corporation. No support is offered for that view, and we know of none.

The first part of respondents' argument proves too much. If the Eighth Amendment could be violated only when a defendant is deprived of life or liberty, the Excessive Fines Clause would be meaningless. That Clause—unlike the Cruel and Unusual Punishments Clause—applies *only* when a defendant has been deprived of money (i.e., fined), rather than life or liberty.

Respondents' second argument—that the \$6 million fine is proportional to criminal and civil penalties that are authorized by statute or have been imposed in other cases—really proves nothing. To begin with, even if it were assumed that a \$1 million fine under the Sherman Act would be constitutional if BFI had been criminally convicted for the conduct involved in this case, that hardly demonstrates that a civil fine *six times larger* than that is permissible.<sup>11</sup> More importantly, the fact that a statute authorizes a maximum fine or penalty for certain generically described conduct cannot mean that this maximum penalty may be constitutionally imposed for *any* conduct falling within the prohibition. To the contrary, the maximum allowable fine is presumably intended to apply to especially grave infractions.

In *Solem v. Helm* itself, the penalty imposed was authorized by statute, and this Court certainly did not hold that a court could never impose the maximum penalty under that statute. Instead, it held that under the circumstances of the case the punishment was disproportionate. Here too, as we demonstrate in the petition (at 24-29), the \$6 million punishment the Vermont jury imposed on BFI was wildly disproportionate under any rational set of criteria that might be employed. Surely, as discussed above (at 6), respondents' general assertion that BFI is very rich and that its conduct was very bad

<sup>11</sup> Of course, this was not a criminal case. If it had been, BFI would have been entitled to all of the protections afforded to criminal defendants (including the requirement of proof beyond a reasonable doubt).

should not be accepted as a satisfactory answer to our disproportionality argument.<sup>12</sup>

Not only is this case a clear and egregious example of punitive damages gone wild, but it is the tip of an iceberg with which the American legal system is increasingly colliding. In addition to this case, the Court now has before it at least three other petitions for certiorari involving constitutional attacks on huge punitive damages awards,<sup>13</sup> and numerous other enormous punitive awards are in litigation in the lower courts.<sup>14</sup> None of the currently pending cases presents the Excessive Fines Clause issue as clearly as this one, but together they demonstrate the seriousness of the problem and the need for this Court's consideration of the issue.

<sup>12</sup> By pointing out (Opp. 28 n.28) that BFI has been subjected to criminal fines under the antitrust laws twice before, respondents engage in a transparent attempt to slip in "facts" not in the record to support their assertion that BFI deserves the \$6 million penalty. Respondents attempted to introduce such evidence at trial, but the court excluded it as irrelevant (C.A. App. 1038-1039). This Court should certainly not permit respondents to introduce and use those "facts" now. Moreover, the record does not reveal whether those prior cases were similar to this one.

<sup>13</sup> *Goodyear Tire & Rubber Co. v. Hodder*, No. 88-626 (petition filed Oct. 14, 1988); *Metromedia, Inc. v. April Enterprises, Inc.*, No. 88-625 (petition filed Oct. 14, 1988); *Nationwide Mutual Ins. Co. v. Clay*, No. 88-157 (petition filed July 27, 1988).

<sup>14</sup> See, e.g., *Miller v. Cudahy Co.*, No. 87-1502 (10th Cir. Sept. 28, 1988) (\$10 million punitive damages award upheld; petition for rehearing and suggestion of rehearing en banc now pending); *FDIC v. W.R. Grace & Co.*, No. 84-C-5031 (N.D. Ill. June 6, 1988) (notice of appeal to the Seventh Circuit filed following district court's rejection of constitutional challenge to \$25 million punitive damages award); *Masaki v. General Motors Corp.*, No. 13023 (Haw. Sup. Ct.) (constitutional challenge to \$11.25 million punitive damages award in product liability case).

Respectfully submitted.

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NOVEMBER 1988

# **JOINT APPENDIX**



**In the Supreme Court of the United States**

OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., AND  
BROWNING-FERRIS INDUSTRIES, INC., PETITIONERS

v.

KELCO DISPOSAL, INC., AND JOSEPH KELLEY,  
RESPONDENTS

On Writ of Certiorari To The United States  
Court of Appeals for the Second Circuit

**JOINT APPENDIX**

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PETITION FOR A WRIT OF CERTIORARI  
FILED SEPTEMBER 30, 1988  
CERTIORARI GRANTED DECEMBER 5, 1988

108 PV

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\* The decisions of the district court and the decisions of the court of appeals are printed in the appendix to the petition for a writ of certiorari and have not been reproduced.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Nos. 87-7754, 87-7758

KELCO DISPOSAL, INC. and JOSEPH KELLY,  
*Plaintiffs-Appellees,*  
v. *Cross-Appellants*

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. and  
BROWNING-FERRIS INDUSTRIES, INC.,  
*Defendants-Appellants,*  
*Cross-Appellees*

On Appeal from the United States District Court  
for the District of Vermont

RELEVANT DOCKET ENTRIES

DATE	EVENT
1987	
September 5	Cause docketed.
1988	
February 23	Case argued and submitted before: Feinberg, C.C.J., Pratt, C.J., and McLaughlin, D.J.
April 21	Filed opinion—Affirmed. Filed and entered judgment.
May 5	Filed petition for rehearing and suggestion for rehearing in banc.
June 1	Petition for rehearing denied.



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

Civil Action No. 84-180

KELCO DISPOSAL, INC., and JOSEPH KELLEY

v.

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. and  
BROWNING-FERRIS INDUSTRIES, INC.

Case filed 06/01/84

RELEVANT DOCKET ENTRIES

DATE	EVENT
1984	
June 1	Complaint filed.
June 18	Summons issued.
July 19	Answer to complaint by defendants.
1986	
January 16	Plaintiff's motion granted to amend complaint to add Count IV—Punitive Conduct.
1987	
January 26	Issues of liability and damages are severed.
March 30	Verdict for plaintiff on liability under Vermont and federal antitrust law.
April 6	Verdict for plaintiff—Defendants are liable to plaintiff for \$51,146.00 in compensatory damages for state and federal antitrust law counts respectively, and for \$6,000,000 in punitive damages.
August 11	Defendants' motion for judgment notwithstanding the verdict, or in the alternative, for a new trial or remittitur is denied.
August 28	Notice of appeal filed by defendants.

TRANSCRIPT OF CHAMBERS CONFERENCE  
(Excerpts)

[March 23, 1987]

[43] Specifically, we can prove that in Houston, Texas, the subsidiary there, and this may be slightly different, maybe not even covered by the motion in limine, engaged in what they call a sales blitz and price gouging, inspired by the Houston office, the central office.

We can prove that in Pittsburgh, Pennsylvania, there was predatory pricing and bribery. We can prove that there was bribery in Houston, Texas, on these issues. Also, I think we can prove to this Court's satisfaction [44] that there has been perjury committed in this case.

And we have done that, your Honor, by taking the depositions of certain accountants, Arthur Anderson accountants, after hearing from the vice president who spoke about the bribe. In fact, what he did was he had told a completely different story to the accountants. He had either made it up one time or another.

And we can prove without question price-fixing conspiracies in Atlanta and in Ohio.

I think that that all goes to the intent of this company. This is not an—it's just simply not an isolated instance. We can also prove that the same people who directed Mr. Mowbray and Mr. Rudolph to put Kelley out of business directed Mr. Kelley to put others out of business when he was the BFI manager and sent Rudolph to other jurisdictions to put other people out of business when he was working for them.

So that we aren't talking, necessarily, about different markets. Some of our evidence is about this market. We will offer that in—when Joe Kelley was the regional manager, Mr. Verrochi, who was then and is now the regional vice president, instructed him to cut his prices in half in order to put a competitor, then Palisades

Trucking, out of business, and then to raise the prices to double once he'd done so.

\* \* \* \* \*

[59] THE COURT: Okay. For the record, in connection with the motion in limine, based on 403, we think we're going to grant it, in that it's unduly confusing of the issues as far as the jury is concerned. And we think the Second Circuit has pretty much followed that line of reasoning in other cases.

\* \* \* \* \*

TRANSCRIPT  
(Excerpts)

[March 24, 1987]

[37] Q Now when you were in Burlington as the district manager back in '81 to '83, was there anyone besides BFI in the roll-off business?

A In Burlington, no.

Q When you were up there, did you have any competition besides BFI?

A Kelly.

Q Kelly?

A Kelco.

Q Did there come a time when Mike Gustin asked you to identify the competition up there?

A Yes.

[38] Q And did you report back to him?

A We did.

Q And who did you tell him your only competitor in roll-off—

MR. RICHARDS: Your Honor, I think Mr. Mowbray should be asked to testify. I'm going to object to that as a leading testimony and I think the witness can testify—

THE COURT: It's leading. We'll sustain the objection.

BY MR. HEMLEY:

Q Who did you report back to Mr. Gustin was your competitor was in the roll-off business?

A Kelco.

Q Now, did Gustin ever ask you to determine the prices that Kelco was charging?

A Yes.

Q Did you do that?

A Yes.

Q Was Kelco during this period, 1982, succeeding in taking business from BFI?

A Yes, he was.

Q And directing your attention to the spring of 1982, was any effort made to buy Kelco?

A Yes.

Q Can you tell us about that?

[39] A I talked to Joe Kelly and expressed to him that BFI would like to buy his operation.

Q Were you able to make a deal with him?

A No.

Q Following his decision not to sell out to BFI, did you receive any further instructions from Gustin?

A Gustin told me to put him out of business.

Q Did you try to do that?

A Yes.

Q And when was that?

A During that period of time.

Q Following the buy-out offer?

A Yes.

Q And how did you go about trying to put him out of business?

A We dropped the prices.

Q Did BFI have—Did you give any thought to whether your prices were above or below cost?

MR. RICHARDS: Objection, leading.

MR. HEMLEY: It's not a leading question.

THE COURT: Yes, sustained.

BY MR. HEMLEY:

Q Did you consider whether your—Did you consider what your cost was when you set your prices?

A No, we didn't.

[40] Q Did you ever have a conference with Mr. Gustin where he advised you, once you had started to cut your prices, that Houston had received word from Mr. Kelco's—Mr. Kelly's lawyers?

A They told me that.

Q Who told you that?

A Mike Verrochi.

Q What did he tell you?

A He told me that Kelly's attorneys sent a letter to Houston and said that if we didn't stop our practice at that time, they were going to start an antitrust suit against us.

Q What further instructions did you get in response to that letter?

A Mike Gustin told me to put him out of business.

\* \* \* \* \*

[70] Q Mr. Mowbray, you have been asked some questions to, on cross examination, about these conversations that you had with Mr. Gustin. And I just want to have you review that with us.

Following the effort that you made to, or the discussions that you had with Mr. Kelly about buying the business, did you not have a discussion with Mr. Gustin about what you should do with respect to Kelly's competition?

A He just told me to do whatever I had to do to put him out of business.

Q Is there any doubt in your mind as you sit here today about what Mr. Gustin told you with respect to eliminating Kelly?

A No.

\* \* \* \* \*

[89] Q Now, when you arrived in Burlington in May of 1981 was BFI of Vermont making any money?

A I did—from what I saw, no, they were not.

[90] Q Was it ever profitable the whole time you were there?

A Not to my knowledge.

Q And when you arrived there, who were your competitors in the roll-off business?

A Joe Kelley.



Q Was there anybody else?

A There was one hauler that had one stop in one town, and that was it.

Q So, basically, it was BFI and Joe Kelley?

A That's correct.

Q Now, did there come a time when Mike Gustin asked you to provide him with a list of the competitors?

A Yes.

Q I'm going to show you what's been marked as Exhibit No. 10—

MR. HEMLEY: And offer it in evidence. I understand there's no objection.

MR. RICHARDS: That's correct, your Honor. No objection.

THE COURT: Very well. May be received.

(Plaintiff's Exhibit No. 10, a letter, was received in evidence.)

Q And once again, Mr. Rudolph, I'm going to ask you to please step down, because we don't have all of our over- [91] head projectors and everything set up yet.

First, just look at that first list. It's a letter written December 22, 1981, and it says, "In an effort to better manage each district's market area effectively, I would like a competitor's list," et cetera. That was from Mr. Gustin to you?

A Correct.

Q Okay. And then the next page, this is your response. Correct?

A Yes.

Q Okay. And the first thing you do is you list all of the rear loaders.

A Uh-huh.

Q And then you list the roll-offs.

A That's correct.

Q And the only name listed under roll-off is Kelco Disposal. Is that correct?

\* \* \* \* \*

[95] Q Now, did there come a time in 1982 when you were instructed to lower your prices on new roll-off business that competed with Kelco?

A Uh-huh. Yes.

Q And who gave you that direction originally—directive?

A Bob Mowbray.

Q Did he explain to you where he'd gotten the instructions from?

A Yes.

Q What did he tell you?

A Mike Gustin.

Q Did you go about reducing your prices at that time?

[96] A Yes, I did.

Q And how did you go about doing that?

A Did a quick market survey to find out what Joe's prices were at that given point. And then we'd just go in, and sometimes you'd just go up to a job site and ask the contractor where he got the box, how much he paid for it. And they'd generally tell you. Take this information and then just start soliciting Joe's accounts.

Q And you would just undercut?

A Try to match the price. And if that didn't work, go underneath the price.

Q When you went underneath Joe's price, did you ever give any thought to whether or not the account would be profitable for you?

A After a while, no. I mean, I—you know what your prices are.

Q But, I mean, was that a concern of yours, whether or not a particular job that you undercut would deliver a profit—

A No.

Q —or were you just undercutting to get the business?

A Just getting the work.

Q Did there come a time when you actually met with Mike Gustin on—up in Burlington?

[97] A Yes.

Q And where was that meeting?

A Well, he came to the office. And then we went to—I believe it was the Holiday Inn. I'm not 100 percent sure, but that's generally where we would go.

Q Okay. And can you report, please, to the jury, as best you can recall, what the discussion was that you had with Mr. Gustin on the subject of competition from Kelco and what your response ought to be?

A Put him out of business. Do whatever it takes. Squish him like a bug.

Q Did he use those words?

A Yes, sir.

Q And did you continue to follow your practice of undercutting when necessary?

A Yes. Yes, I did.

Q And did Mr. Gustin, on that occasion, specifically tell you that if it was necessary, you should just drop your prices?

MR. RICHARDS: Objection. I think Mr. Rudolph ought to testify.

THE COURT: I'm sorry?

MR. RICHARDS: Objection. Leading. I think the witness ought to testify.

THE COURT: Well, it is leading.

[98] MR. HEMLEY: I'm afraid I missed part of the answer, your Honor.

THE COURT: Well, why don't you ask another question?

Q Tell us—I don't know how to do it other than to ask you to repeat it, because, unfortunately, I missed it—what it was that Mr. Gustin said at that Holiday Inn meeting on the subject of price cutting.

A Do whatever it took. Put him out of business.

Q What did you understand that to be?

A If it meant give the stuff away, give it away.

Q Do you remember—who else was at that meeting, by the way?

A Mr. Mowbray.

\* \* \* \* \*

[101] Q Was this policy that you put into effect on Mr. Mowbray's and Mr. Gustin's instructions generally as to all new business with which you were competing with Kelco?

A As a rule, yes, it was.

\* \* \* \* \*

[107] Q . . . Did the elimination of dump fees that you have indicated pertain to anyone other than Kelco's customers?

A No.

[108] Q Did the elimination of the rental fees pertain to anybody other than Kelco's customers?

A No.

\* \* \* \* \*

[114] Q Why was it, Mr. Rudolph, that you went in and you charged a price to Velan Valve and to others, where you would get, for example, only twenty-eight dollars in the period of time?

A To get the work.

Q And what did it have to do with Kelly?

A It was his customer.

Q And was there any intent to put Kelly out of business by getting that work?

MR. RICHARDS: Objection. —

THE COURT: Yes, we'll sustain that.

Q What was your intentions with respect to Kelly?

A To do what I was told.

Q And what were you told?

A Put him out of business.

Q And by whom?

A Pardon me?

Q Who told you that?

[115] A Well, Mr. Mowbray told me and I heard it from—

MR. RICHARDS: Objection.

THE COURT: I'm sorry?

MR. RICHARDS: Objection to what he heard.

MR. HEMLEY: Heard it from Mike Gustin, it's an admission.

THE COURT: Yes, it's all right. We'll leave it.

\* \* \*

[157] Q There's some question about when the price cutting took place. And I want to see if we can clear that up. I think you've indicated that it started sometime around the fall of 1982, and then it continued until sometime in the spring of 1983.

A Correct.

Q Now, when a price is cut on a big job, like, take, for example, the Pizzigalli medical center hospital job, did that price stay in effect after May of 1983?

A The price would stay in effect usually till the job was completed.

Q So there were jobs that continued after May of 1983 that had been affected by the lowball prices. Is that correct?

A That's correct.

Q On the jobs where you undercut Kelley, were those generally long-term jobs?

A Yes.

\* \* \*

[158] Q Now, you testified in response to one of Mr. Richards' questions that you told Mr. Verrochi that you had undercut Kelco's prices on certain jobs. Now, let me ask you, was that on the new business that you were writing [228] against Kelco that you would undercut? You undercut against Kelco on new business that you were writing?

A New business.

Q Was it all the new business?

A Any job-up until the point we started, and we knew he was going at it. Absolutely.

Q So wherever it was necessary to get the job, you would go under his price?

A That's correct.

Q And Mr. Richards asked you some questions about your discussion with Mr. Verrochi. And you described that Mr. Verrochi asked why you had undercut the prices and that you then told him.

A That's correct.

Q What did you tell him?

A To take the business from Kelley.

Q Did he offer any objection to that?

A No.

Q Did anyone from BFI's regional office in Boston at anytime during the time that you were price cutting ever tell you to raise your prices on the Kelco jobs?

A No.

Q And they had the price information because you sent it to them on a monthly basis?

A That's correct.

\* \* \*

[165] Q . . . Was there a time that you became aware of talk of trying to buy Kelley?

A Yes, I was.

Q Do you know what became of that discussion?

A It fell through.

Q And after that what happened to prices?

A Our prices went from—went down dras—dras—

Q Either dramatically or drastically. We'll take either one.

A Yeah.

Q But we can't have them both.

A They went down considerably. How's that?

Q That's great. Thank you. During this period when [166] the prices were down, if BFI got one of Kelco's customers, was there any talk about it in the office between Mr. Mowbray and Mr. Rudolph?

A Yeah, lots of times there were.



Q What kind of discussion was there?

A It was that we got another one of Kelley's stops.

Q And did they talk about what that would mean to Kelley's survival?

A Yeah. That it would hurt him.

. . . . .

[187] Q Were you involved in the financing of the new company?

A Yes, I was.

Q Can you tell us, tell the jury how the funds were obtained to start up Kelco?

A Well, there were our life savings, plus we sold the house and moved to a condo.

Q And after you started it up, during the first year of operation, was it necessary to put more cash into the business?

[188] A Yes, it was.

Q Over that first year, about how much of your own dollars, derived from the sale of the house and your other savings, did you put into the new business?

A Probably around a hundred thirty thousand. Around there, roughly.

Q Did you borrow any part of that hundred and thirty?

A Yes, probably around sixty thousand.

Q So of your own cash, how much was put in?

A Between seventy and seventy-two.

Q And over the years following that, from 1981, let's say, until 1984, was it necessary to put in more cash?

A Yes, over the years, we have periodically put in.

. . . . .

[189] Q Did Kelco have any cash flow problems as a result of the loss of business between—

A Yes, he did. It was very hard to pay the bills and keep the business going. He had used trucks which were getting old, and—

Q Did you and Joe talk about whether an action, whether some action, I don't mean a legal action, whether some complaint or an action should be taken after the price cutting started?

A Yes.

Q And did you decide to do anything about that?

A Yes, we decided he should see a lawyer.

Q And you consulted a lawyer in my firm, my partner, Charlie?

A Yes.

Q And did Charlie write a letter for you?

A Yes, he did.

Q Did you get any response from Houston to your letter?

A No.

. . . . .

[March 25, 1987]

[57] Q And how many jobs did you determine over the two-year period BFI charged less than its average variable cost?

A Approximately seventeen hundred and fifty pulls or pick-ups.

Q What percentage of that seventeen hundred and fifty pulls bear to all of the jobs that BFI handled during that two-year period?

A That amount was approximately one-third of all the work that BFI had.

Q And what did, what did you do after figuring out that BFI had seventeen hundred below cost pulls?

A I then figured out the lost profits to Kelco as a result of Kelco not having that work.

Q And how did you go about doing that?

[58] A I took all of these jobs and determined, based on Kelco's price list, what Kelco would have charged for that work. I then deducted the cost what Kelco would have incurred to service that work, and the difference

was the profit on each one of those jobs that they did not have. I then summarized all the profits on those jobs, came up with a number.

Q Did you reach a judgment as to whether BFI's pricing below cost was the cause of Kelco losing these profits?

A Yes, I did.

Q And what was that conclusion?

A That it was.

Q And why did you reach that conclusion?

A I reached that conclusion because I assumed, and I felt, that BFI—that Kelco would have obtained all these jobs had BFI not had them.

Q Why did you reach that determination?

A Because Kelco would have charged less than BFI's normal selling price or normal charges. In other words, Kelco would have been able to meet BFI's prices and therefore obtain the work.

Q Did you determine whether this roll-off business, the roll-off trash disposal, is a price sensitive business?

A Yes, I did.

\* \* \*

[61] BY MR. HEMLEY:

Q Mr. Battelle, I'll move this over to the easel and ask you if you can just tell us what these figures represent and how you calculated them.

A Okay. What I have tried to generally depict here is the price movements—excuse me, the revenue, the revenue, the total revenue earned on a monthly basis by BFI and by Kelco over the period we have been talking about, which is October 1, 1981 to October 1, 1984, and thereafter.

And I have divided the chart into three or four segments here. This segment up to this yellow line is called a normal situation. Then this is the period that BFI dropped their prices to sixty-five dollars, and this is the period that BFI reinstated the dump fee. In other words,

it was sixty-five and then they added the thirty-two dollar dump fee.

And this is the period after the spring of 1984 when BFI returned to normal pricing and even higher pricing than they had back in the early period of time.

I call this period, this first year, October 1, '81, to October 1, 1982, kind of a normal situation, where, where there's no problem. BFI's monthly sales were dropping.

Q Before, before we get too far, let me just ask you to tell us where you got the, the numbers which form the basis for this, this chart, so we know that.

A Okay. The numbers for BFI come off their monthly [62] departmental expense reports. In other words, these are BFI's sales per their internal reports on a month-by-month basis, from October 1981.

Kelco's figures come off their monthly reports, which were prepared by Muriel Kelley monthly, summarizing the amount of revenue that they earned from their roll-off business.

Q Okay.

A All right. So BFI's sales per month, and this, there's fluctuations here. I have kind of drawn a general trend line. In other words, it might be something like this. But this point and this point is accurate. BFI's sales dropped from this point down to this point, from October of '81 to October of '82.

Kelco had started business in '80 and their sales were increasing, as shown by the green, green line here. So at this point in '82, for that particular month, Kelco's sales had surpassed BFI's.

At the point the prices were cut, BFI began to increase their monthly revenue. Despite the fact they cut prices there, their monthly revenue went up, which would mean that they would have gained a substantial amount of new business or new jobs.

Kelco felt that, that pressure, if you will, and their, their monthly sales dropped, so this is a period October 1 of '82 to approximately May of 1983.



[63] At this point BFI began to increase their prices again. Again they reinstituted the dump fee. BFI's monthly revenue then remained relatively flat from May, approximately May of 1983, on into the end of fiscal 1984.

At this point BFI's charges were still below their average variable costs. Kelco was still feeling the impact and their sales declined during this period as well.

And finally, when BFI increased their prices further, to one fifty-seven, to one seventy-two, we were talking about, Kelco's sales then began to increase rather dramatically; in other words, back when, when prices returned to, more to a normal situation. BFI's again remained relatively flat during the period.

So to sum up, the situation was BFI, sales were dropping; Kelco's were increasing. BFI drops their prices, the result is Kelco sales go down, BFI's go up. And then as BFI raises their prices, Kelco begins finally to recover. BFI's sales are relatively flat during that period.

Q And just to take it all together, how does that relate then to your conclusion that the lost business that Kelco suffered was a consequence of the price drop that BFI imposed?

A I think the graph pretty clearly depicts that during the period that BFI dropped prices, Kelco's sales dropped.

\* \* \* \* \*

[66] Q All right. Thank you. Based on your analysis, I just didn't ask you to do that in the abstract, based on your analysis of the revenues and the profits of BFI, Inc., did you reach a conclusion as to whether BFI, Inc. could have sustained losses here in the Burlington area over a, an extended period of time?

A Yes, they could have.

Q And why is that, based on what you know of the structure of the company?

A Well, BFI has been an extremely successful and profitable company. They have a large stockholders'

equity. They have been profitable for a long period of time. And their profits have been growing.

\* \* \* \* \*

[67] Q By contrast, did you study the financial condition of Kelco during the time period?

A Yes, I did.

Q Can you tell us what condition you determined Kelco to be in during this time period?

A Kelco was in a fairly, very fragile financial condition during this time period.

Q And explain to us, please, what you mean by that.

A First of all—First of all, in, at the end of fiscal 1982, when the problems started, Kelco had incurred—first of all, had only been in business for two years. It had incurred losses to date; there was no equity in the business.

Their liabilities exceeded their assets. They had negative working capital, forty-eight thousand. They had lost [68] money in 1982. Mr. Kelley had invested seventy-five thousand dollars in the business. And through his equipment, he was on the hook for another fifty-five thousand dollars.

\* \* \* \* \*

[69] Q That means he had borrowed?

A He had borrowed, excuse me, yeah. In other words, to this point he had not been profitable. He had no working capital, substantial amounts of loans, and no equity.

At 9-30-84, at the conclusion of this period, he was in slightly better shape. He now had \$6,000 in equity in the business. But he still had a negative working capital position of \$75,000, and he had lost money in 1984. He had made a profit in '83, but he lost money in 1984. So looking at his overall financial position, he was still in very poor shape at September 30, 1984.



Q Well, how do you explain that he was in a slightly better condition two years later after this price cutting took place than he had been when the period started?

A Repeat the question, please.

Q How is it that he managed to be in a slightly better financial condition at the end of the period?

A He had made a slight amount of profit. In other words, the amount of the jobs that he had lost to Kelco—or, excuse me to BFI, the jobs he'd lost to BFI, represented not all of his business, obviously. He still was able to obtain other business.

The jobs lost to Kelco were about one-third—

Q I think you mean the jobs lost to BFI.

A I'm sorry. The jobs lost to BFI would have been about [70] one-third of the total business. So the other two-thirds was business that he did enjoy. And he had moderate degree of success in that.

Q Did he save any interest or repair expense during that period?

A Repeat the question, please.

Q Was he able to save or not pay the interest or the repair expenses in the period in question?

A Well, in 1983 he had shown a profit, however, no interest was paid on any of his personal debts to the company. So although there was a profit, there were some charges there that were not included. For example, no interest was—as I said, there was no interest charged on his obligations.

In addition to that, his repairs on his equipment were quite low in 1983.

Q Now, how does the financial condition of Kelco relate to the fiscal years—that is to say, we understand he's on a fiscal year and that's what you studied, from September—excuse me—from October 1 to September 30.

A Correct.

Q All right. We also know that the initial price cutting took place in the first six months of that fiscal year ending 1983, although it carried on through 1984.

A Correct.

[71] Q All right. How did that fiscal year relate to whether Kelley was able to make even a slight profit as the time period went on?

A Could you rephrase the question? Repeat the question.

Q Yeah. Well, let me think about it for a second.

I guess what I'm trying to ask you is towards the end of the year—

A Calendar or fiscal, again?

Q Fiscal year. —were Kelley's sales different than they were during the immediate price cutting and—is there something seasonal about it that affects the overall picture or something monthly about it that affects the overall picture?

A I don't understand—I don't understand the question. Are you specifically referring to a year, a particular year?

Q I'm specifically—I'm trying to get you to explain to us how it is that Kelco could have possibly shown even a slight improvement during the period when there was cutting of prices.

A Okay. They could have shown a slight improvement by not adding equipment and by the fact that they were marginally profitable.

Q Based on the jobs with which he was—other than the one-third which were—

A Yeah. As I indicated, he did have some work. In other [72] words, there was some other jobs—there were other jobs that he did actually have. He did not lose all of his business during the period. He still had business.

Q Did he have some jobs that he had taken on before the price cutting?

A He had jobs that he had taken on, yes, before the price cutting that would have extended into the period when the price cutting took place.

So, for example, he might have had a job that he—that he obtained in, let's say, the summer of 1982 that

lasted a year, a year and a half or two years. So he would still have that work in 1983 and in 1984.

Q And what was your conclusion at the end of the period as to the shape that Kelco was in financially?

A At the end of fiscal year 1984?

Q Yes.

A Not good.

Q And why do you say that?

A Because, as I mentioned, his overall equity position was nil. He had a lot of loans outstanding and he really had not been profitable on a cumulative basis to that date.

Q And when we know that by the end—by, say, the spring of '84, BFI had changed its policy and the trends show that Kelley's sales started to pick up when their prices were normalized, when they were no longer pricing below [73] average variable cost.

A Yes.

Q Do you have a judgment as to what the consequences to Kelley would have been had the price cutting continued over a longer period of time?

A I don't think Kelley would have survived in the roll-off division—in the roll-off business.

\* \* \* \* \*

[130] Q Mr. McGrath asked you a number of times to indicate [131] whether at the end of the period—As we all know, Kelco is still in business, Kelco is still here. Did there come a time after March of 1984 when BFI stopped cutting its prices and raised its prices to a normal level?

A After what date?

Q Well, after March of '84.

A Yes, they did.

Q And did the fact that BFI ceased its price cutting, in your judgment, have anything to do with the fact that Kelco Disposal is still in business?

A Yes, I think that certainly is a factor in their being, their continuing to be in business. An important factor.

\* \* \* \* \*

[March 26, 1982]

[38] Q Now, while you were reuniting this company and getting into [39] the roll-off business, did there come a time when somebody else had a company by the name of Palisades, tried to start up a roll-off business?

A They did. They got a couple of small supermarkets or something.

Q Did you discuss Palisades competition with Mr. Verrochi?

A Yes, I did. Mr. Verrochi and Mr. Dooley.

Q Where did that discussion take place, if you remember?

A They were up here for something, I don't know, some meeting we had. That came up in the discussion.

Q Can you tell us what you recall their instructions to you were?

A Mike Verrochi said, cut the price in half, put them out of business; when he goes out of business, then you double your price.

Q Did you do that?

A No, I didn't.

Q Why not?

A Well, I'm just not that kind of a businessman and I figured I could compete with him, you know, honestly and fairly.

\* \* \* \* \*

[46] Q Did he offer you a specific price for your business?

A Yes. Around \$140,000, 40 or 45.

Q And how did that compare to what you felt your business was worth?

A About half.

Q Did you accept the offer?

A No, I did not.

Q And after your discussion with Mr.—Mr. Gustin, and you declined to accept that \$140,000 offer, what happened to [47] BFI's prices?

A Shortly after that they just went around and cut the prices everywhere.

Q Were you able to compete with those low prices?

A No. No.

Q Did you lose any jobs as a result of those low prices?

A I did, yes.

[61] Q So on October 26, 1982, your lawyer, Charles Shea, wrote a letter as follows, to Merrick C. Walton, Esquire, at Browning-Ferris Industries, Inc., in Houston, Texas.

"Dear Mr. Walton, we represent Kelco Disposal, Inc., a waste removal company located in South Burlington, Vermont. We have been informed by Kelco that Browning-Ferris has eliminated dumping fees and rental charges for bins at construction sites in this region in an attempt to force Kelco out of business.

"We believe this action by Browning-Ferris violates state and federal pricing laws. Unless Browning-Ferris ceases to compete unfairly with Kelco immediately, we will initiate legal proceedings on behalf of Kelco.

"Thank you for your attention to this matter. Very truly yours," with a carbon copy to Douglas Richards, who is here in court today.

Did you ever get a response from Browning-Ferris Industries to that letter?

A No, we did not.

Q Did the price cutting continue?

[62] A Yes, it did.

[116] Q Now, you testified Mr. Verrochi said cut your prices and drive them out of business and then raise your prices; is that correct?

A He said cut the prices in half; he said drive them out of business. When they go out of business, double your prices. The way they did it some places out west or whatever.

Q Okay. And you ignored that. You didn't do anything about it, right?

A I did not.

[136] Q So, now, what did Mike say to you at that time, this fellow who was an employee of BFI from the Boston office, on that occasion in the Holiday Inn?

A Well, Mr. Rudolph had—him with Mike sitting with him, had asked me about the letter and whether A.C. Hathorne had made a determination to go with them or not. And I said at the time, no. And also that we had discussed Kelco in the sense of I was going to stay with Kelco.

And I'd mentioned that they'd offered Kelco a price, but I thought—you know, he thought it was too low or whatever. And Mike had mentioned that he would probably be out of business within six months, anyways.

Q And Richard Rudolph was present during the conversation?

A Yes, sitting to my left. Mike was to his left.

[137] Q Now, what did you say and what did Mr. Rudolph say?

A Well, I had mentioned that we had not made a determination on his letter, you know, from him, in the office. And then I had also talked with Mr. Rudolph himself in reference to Kelco had—that I thought, you know, somebody had mentioned that he—they offered him a low price.



Q Okay. Now, when you say you mentioned to Mr. Rudolph that someone had offered him a low price, what were you referring to? What were you taking about?

A Kelco. Kelco's business.

Q And, in other words, someone from BFI had offered a low price to Kelco for its business. Is that right?

A This is what I had told Mr. Rudolph, right. And that's when this fellow with him, Mike, had mentioned that it didn't matter whether he accepted it or however it was worded, but that he probably wouldn't be in business in six months, anyways.

Q Didn't matter whether Kelco sold out, because he wouldn't be in business six months later, anyway, is that what you're saying?

A Right.

[150] Q . . . Have you ever given any thought about going into the roll-off business?

A Well, that's about as far as it went, is a thought.

Q And why is it that that's as far as it went?

A Because I didn't, I never had the access to the amount of money that it would take to start and operate a business.

Q Do you have any idea how much money you would need to get started?

A I have a general idea. In order to do it, you would have to have at least two trucks, and several containers, and the prices that Joe quoted earlier were by far the market price of such equipment.

Q You just don't have that kind of capital?

A Oh, no. I don't even have it available to me.

[March 30, 1987]

[57] Q Now, during the time period, then, that followed this memo in which you were advised by Mr. Rudolph that there was only one competitor in roll-off,

namely, Mr. Kelley, [58] that's when you started to talk to Mr. Kelley about acquiring his business, July of 1982. Correct? I think if you look at Exhibit No. 11 that's right in front of you, you'll see that's the date of your inquiry.

A Right.

Q But that didn't work out, did it?

A No.

Q Because you valued—you offered him between one-third and one-quarter, depending on whether it was \$300,000 or \$400,000 of what Mr. Kelley told you that the business was worth. Correct?

A Right.

[61] Q And you knew that after Kelley refused to sell to you, prices started to come down in Burlington, too, didn't you?

A No.

[62] Q You didn't know that?

A Yeah.

Q Sure of that?

A Prices had been coming down from the day he started in business.

Q Prices started to come down in response to his competition, as well?

A Right.

Q If there hadn't been competition from Kelley, the prices would have been up higher? Right?

A If there was no competition, they probably would have been.

Q You were aware that, in response to Kelley's competition, Mowbray was reducing his prices. Right?

A Yes.

Q And as you just indicated, if there were no competition, you were also aware that the prices in Burlington would have been higher. Correct? That's what you just said, didn't you? I think you just—

A Which accounts are we talking about?

Q Any accounts. If there were no competition BFI would have been able to charge a higher price. Correct?

A Probably.

[95] Q Referring to page 23, lines 4 through 7. Do you recall that the question was asked you—I think I took your deposition. “Did you have any discussions with Mike Gustin about the losing—the fact that Burlington was a loser when you first came on?” And what was your answer at [96] that time?

A “Yes, we talked about it.”

Q And you saw that Mr. Mowbray was pricing low on the roll-off business. Correct?

A Yes.

Q That was not hard to see from the reports that you received, was it?

A No.

Q And you came to the conclusion that Mr. Mowbray was losing money on the large containers, the roll-off business. Correct?

A I brought it to Mr. Mowbray's attention. Correct.

Q You also brought it to Mr. Gustin's attention, didn't you?

A Yes.

[April 7, 1987]

[70] Q Now, Mr. McGrath also asked you to consider an assumption based on that chart which we've just talked about. He asked you to assume that Kelley would have only gotten 900 pulls instead of the 1700 pulls which you determined were priced below BFI's average variable costs. And he asked you also to assume, one of his assumptions, to assume that BFI would only price their new jobs or those jobs at \$72.70 a pull.

A Yes.

Q Remember that analysis in his assumption?

A Uh-huh.

Q Okay. Based on your review of the records in this case, when BFI started to price legally after John Verrochi came to town, did they only charge \$72.77?

A No. They charged more.

Q Did they charge substantially more?

A Yes. 157, 172. More than twice as much.

[71] Q Did BFI's pricing guidelines, issued from Houston, which all of the district managers were obliged to follow, suggest a price at their average variable costs?

A No. No. In excess of their average variable costs, considerably in excess.

Q When BFI charged a price in Springfield, which presumably was a legal price, did they charge only \$72.77?

A No. As we indicated, BFI chose—BFI charged an equivalent price of \$147 per pull.

[March 24, 1987]

[57] Q Okay. And as I understand your testimony, this came into the picture, as far as you were concerned as the district manager, after an attempt to buy Mr. Kelley's business.

A Yes.

Q Now, again, do you have a recollection, Mr. Mowbray, as to the conversation you had with Mr. Kelley about buying his business? And I'm sure you don't recall the exact words, but let's say the substance of that conversation.

A We just discussed—we expressed a desire to own his business.

Q So you and Joe Kelley got together?

A Yes, we did.

Q And, in fact, where did you meet Mr. Kelley? Do you remember?

A Holiday Inn.

Q All right. Did you meet at a conference room somewhere or some other place?

A No. Right at the—a table in the lounge.

Q Okay. Has that got a name, if you remember?

A I can't remember.

Q Okay. And you discussed buying the business?

[58] A Yes.

Q Discussion take very long?

A No.

Q You said you'd like to buy his business?

A Yes, we did.

Q Did Mr. Kelley give you any response, other than the fact that he said, "No"?

A No. He indicated that he was going to put us out of business.

Q So Mr. Kelley told you he was going to put you out of business?

A Yes, he did.

Q Did Mr. Kelley indicate that he intended to pick up BFI's business in Burlington after he put you out of business?

A Yes, he did.

Q So that was his statement at the time?

A Yes.

Q So it wasn't a case of, No, it was a case of he was going to put you out of business?

A Yes.

\* \* \* \*

[March 27, 1987]

[29] Q Within the setting of your description of the roll-off business, John, and after you got there, what if any decision did you make in terms of pricing the roll-off business?

A Well, in pricing the roll-offs, knowing that that was probably my only, the only thing that I could do, I went through almost each and every account, and the ones that

were below, that I felt that were below, okay, that weren't making money or breaking even, I would, I raised them right away, since I got up there.

Q How did you find out, how did you determine whether or not they were below what you thought?

A The same, the model that I had. Like I said, the model is what I used, and I used it as a rule of thumb, and if it was something that was so far below, I knew that I had to raise the prices and I did raise the prices.

Q Where did you get the information to—Well, how did you identify or from what source did you identify the existing [30] accounts on the roll-off, now?

A The aged trial balance, the ATB.

Q And that came up monthly from the district?

A That's correct.

Q What if any decision did you make in terms of the new business? And again we're talking about roll-off.

A New business is, was set a standard, was set a rate, and one went by that rate. Sometimes we, we tried to be a little bit more competitive and went down a little bit below that rate, but never went down to a place where we were going to lose money. I always worked on it.

Q You had a goal; is that right?

A We always worked on a goal.

Q What was that goal?

A The goal was to make money for, and stay above my budget.

Q Now you say, John, that when you discovered or learned that there was an old account that was below what you thought, or was not profitable, and you got the price up; is that correct?

A That's correct.

Q How did you do that. How did you accomplish that?

A My price increased. If I lost them, I lost them.

\* \* \* \*



[March 26, 1987]

[25] Q All right. Now, since June of '84—Let me strike that. At the current time, are there any other waste disposal haulers in your area that would, could, or might offer that [26] same service to you?

A I know of two others, but only because of my contacts with them in '84. There may be others at this point. I haven't reviewed the market.

Q So nobody has come to you since June of '84, or November of '84, as you said, and offered you any lower prices for this service; is that correct?

A I have nothing documented and I recall of nothing. There may have been phone calls, but I don't remember any.

Q At any rate, Kelco's price has been the price that you have stayed with through, throughout, since '84?

A Correct.

Q Do you know of a company called Trash Unlimited?

A No.

Q You have never heard of them?

A (Witness shakes head.)

Q Have they ever come to you and offered you a price on roll-off services?

A If they did, it didn't set an impression on me. I don't remember.

\* \* \* \* \*

[110] Q Now, in 1983, BFI sold its business to Trash Unlimited; isn't that correct?

A They sold it. I don't know what the exact date was.

Q Okay. And if I suggest around October of '85, would that be consistent with your thinking? You have no reason to believe that?

A No, I have no reason to believe that's—

Q Therefore, by late 1985 and 1986, Trash Unlimited was doing business in the same area where BFI had been doing business; is that not correct?

A True.

Q Had there been any other competitors in the roll-off side of the market?

A We said occasionally there would be one come in for a time, but they, they never stayed.

Q And that was true during 1986?

[111] A As far as I can remember, yeah.

Q But it was still true in 1986?

A Yeah.

Q Once Trash Unlimited was your principal competitor, did you solicit any of their accounts?

A Not that I recall.

Q You stayed away from their accounts?

A As far as I know.

Q You haven't tried to get any of their accounts with lower prices

A Not that I recall.

Q You have the truck capacity to do it, though, don't you?

A I do.

Q You have the assets to take some of their business, if you wanted to?

A Maybe. I don't really know.

\* \* \* \* \*

[116] Q Now, you testified Mr. Verrochi said cut your prices and drive them out of business and then raise your prices; is that correct?

A He said cut the prices in half; he said drive them out of business. When they go out of business, double your prices. The way they did it some places out west or whatever.

Q Okay. And you ignored that. You didn't do anything about it, right?

A I did not.

Q Just didn't do anything. And they never said anything to you again about it?

A They may have. I don't remember.

\* \* \* \* \*

[April 7, 1987]

[75] Q Mr. Kelley, you listed four—I think it was four accounts, Kennett's IGA and three others, that I believe you said you're not doing now. Is that correct?

A No.

Q Who is doing those?

A Trash Unlimited, who purchased BFI.

Q And they purchased BFI about a year and a half ago?

A Approximately, yeah.

Q And have you gone and solicited those accounts since that time?

A No, I haven't.

\* \* \* \* \*

[March 27, 1987]

[99] Q Okay. Have you ever sold any in Vermont?

A Yes.

Q How recently?

A The last roll-off I delivered to Vermont was within the last year, I believe.

Q And was it used?

A Yes, it was.

Q And was it operating?

A Yes.

Q And what was the price?

A It was in the twenties, low twenties. And it's still operating today.

Q Have you sold any roll-offs, let's say within the past 30 to 60 days in the area that you service, used?

A We delivered one this morning.

Q And the price?

A \$31,000.

Q Now, do you handle or sell used boxes, 30-yard boxes, that go on the roll-offs?

A They're extremely difficult to come by. We do come across and we do sell them, but most instances you can't find [100] them.

Q So there isn't much of a supply. Is that what you're saying?

A That's correct.

Q And do you handle the sale of the new boxes, the 30-yard boxes, to go on the roll-off?

A Yes, we do.

Q And what are the prices of—

A From 2650 to 2850.

Q So they're in the neighborhood of \$2,600 to \$2800?

A That's correct.

Q Would there be any discount, if I may call it that, in a volume delivery of those, if, let's say, a person bought more than two or three at a time?

A Not really. I could—I just delivered 10 of them and there was no discount involved.

Q In the course of your handling sales of either new or used roll-offs or the boxes, do you get involved in the financing?

A Yes, we do.

Q And what's the nature of your involvement? What do you do?

A We have a leasing company we work very closely with. And I call them in when we need to finance them.

[101] Q So then it's correct, sir, that this equipment, the new and used roll-offs, can be leased as well as purchased?

A That's correct.

Q From your experience and knowledge of the business and, again, in the sale of new and used roll-off equipment, are there some guidelines in terms of capital that a person must have to get in that business?

MR. HEMLEY: I object on the basis of foundation at this point, your Honor.

THE COURT: Well, if he knows, we'll let him answer.

A There were people that go into the roll-off business with a very minimal amount of capital. Used trucks out there, some of them may not be the best trucks, some of them barely operable, some are out there for \$5,000 or \$6,000. And you buy a couple of boxes and you're in business.

\* \* \* \*

[March 30, 1987]

[42] Q Okay. Now, Mr. Gustin, there's been some testimony in this courthouse that you told Mr. Mowbray to drive Mr. Kelley out of business. To drive Kelco out of business. Did you ever do that, sir?

A I never instructed Mowbray or anybody else to put Kelley out of business.

Q Did you ever instruct anybody to drive anybody out of business?

A Never.

Q Did you ever tell Mr. Mowbray he was free to charge below his costs?

A No.

Q What did you tell him about pricing in relation to his costs?

A I told him to get out and compete. Get his share of the market.

Q Now, did he ever bring up to you anything about how, about Kelco and Mr. Kelley's approach toward the competition?

A He used to, he was whining all the time about Kelley and the statements that Kelley was going to put him out of business.

Q And what did you tell him in response to that?

A Go compete. Go get the work.

Q Mr. Rudolph we haven't talked about. Do you know who Mr. [43] Rudolph is?

A Yes.

Q Who is Mr. Rudolph? Let's go back then. 1981, who was Mr. Rudolph and what was he doing?

A He was basically, the way I understand it, salesman and he also drove truck and whatever.

Q Okay. Did you deal with Mr. Rudolph or how often did you deal with Mr. Rudolph?

A I never dealt with Mr. Rudolph. I'd see him on occasion.

Q See him on occasion. Do you recall having conversations with Mr. Rudolph about competition?

A No.

Q Do you recall ever talking to Mr. Rudolph about Kelco and competition with Kelco?

A No. If, if—I went up there, maybe one or two times, if Rudolph was around, but I don't remember any conversations with Richard Rudolph. It would be with Mowbray.

Q Did you ever tell Mr. Rudolph to drive Kelco out of business?

A No.

Q Did you ever tell him to squish him like a bug?

A No, I don't speak that way.

Q Is "squish him like a bug" a phrase that Mike Gustin uses?

A No.

[44] Q Did you ever tell him to do whatever he, do whatever it takes to drive Kelco out of business, croak him?

A No.

Q There's been some evidence in this case that Mr. Rudolph, and a fellow by the name of Mr. Dunchus, from the Hawthorne Roofing Company, were in a, I guess the bar lounge of one of the hotels up there, and there was this fellow from Boston named Mike, and that Mr. Dunchus said, "Joe, I have got a good deal from Kelco. I'm going to go with him." And that this Mike fellow said, "Well, it's not going to matter much, Kelco isn't going to be in business six months from now."



Q Do you recall ever having any conversations with Mr. Rudolph and some customer of his?

A No.

Q Do you recall ever telling anybody that Kelco wouldn't be in business very long, somebody,—

A No.

Q —somebody outside of BFI? Now, Mr. Mowbray testified...

. . . . .

[99] Q Well, you've indicated in earlier testimony that there was constant—as I recall it, there was a constant direction to get the prices up. Is that correct?

MR. HEMLEY: I'm going to object. The question's been asked and answered.

THE COURT: We'll take the answer. It's overruled.

Q Do you want the question read back?

A Yes, please.

MR. RICHARDS: Mr. Currie.

(The pending question was read back by the reporter.)

A Yes. That is correct.

. . . . .

[March 26, 1987]

[7] Q Now, are your lending requirements, based on your experience in the business community in Rutland and Burlington, about the same as the other banks?

A I expect that they're all within the same range.

Q And if, in addition to the capital costs, you became aware that there was a large company in the market which had driven a competitor out by pricing very low, would that affect your lending decision at all?

A Yes, it would.

Q And in what way and why?

A Well, in the roll-off business, my experience has been [8] there are limited number of customers. It's not like a regular rubbish business, where you can go to households and pick up or you can go to small businesses; that they generally are oriented towards contractors and large malls or large manufacturers that have great volumes of refuse that has to be removed.

So the number are fairly limited. I would suspect in our market, for instance, in Rutland here, that there probably are no more than 30 or 35 roll-off units currently deployed.

Well, the difficulty—and that means there aren't many opportunities. And if you have a company that's presently dominant in the market and servicing the market, and the perception is that company has, in fact, driven a former competitor out of business for whatever reason, that we would look very hard at the new company coming in. And you used the example of someone new to the business coming in and starting a roll-off business.

We'd be very reluctant to lend money to that individual. And if we did, we'd probably shy on the conservative side in terms of the funding of that proposal.

. . . . .

Q Well, just to do the math, if we said \$230,000 [9] for the capital costs, plus the working capital, that

would bring the total necessary capital for the initial investment up to be about what, about \$300,000?

A \$300,000, \$310,000, using the figures you used.

Q Now, would the bank lend any of that working capital?

A Generally not, because there's no security. We'd look to that as being a capital investment by the principals.

Q The bank would lend about 5 percent of the—of the fixed—

A Fixed assets.

Q —fixed assets, and take collateral, take security in the assets. Is that right?

A That's correct.

Q So that the actual out-of-cash—out-of-pocket cash that the man would have to come up with would be around \$200,000—be half of the 235, plus the 60?

A That's correct. Plus the—well, I think in the example we used, you said \$15,000 a month. If that figure is correct—

Q I don't know.

A —it would be \$90,000.

. . . . .

(March 27, 1987]

[51] CROSS-EXAMINATION BY MR. HEMLEY:

Q Mr. Verrochi, start off by asking you the obvious question. You came up to Burlington to work for BFI in the Burlington district after Mr. Mowbray left. Is that correct?

A That's correct.

Q You replaced him?

[52] A That's correct.

Q So what went on before you got there when Mr. Mowbray was the district manager is not any thing that you were involved in at all. Correct?

A With Burlington?

Q Yes, with Burlington.

A That's correct.

Q So whatever Mr. Mowbray may have done or Mr. Rudolph may have done or conversations that Mr. Mowbray had with Mr. Gustin about competition before you got there, those would have taken place while you were working in Quincy, Mass.?

A That's correct.

Q When you came up to Burlington, you told us that the—one of the first things that you were interested in considering was the possible acquisition for you, John Verrochi, was going to buy this company?

A That's correct.

Q Just so it's clear, you weren't considering buying it as BFI was going to buy a—BFI or already owned the company?

A That's correct.

Q So you were going to buy it as John Verrochi?

A That's correct.

Q And, obviously, again to point out the obvious, [53] John Verrochi doesn't have the resources behind him that BFI has? You don't have the wealth and power that BFI has?

A No.

Q Okay. I didn't think so.

But you made the decision that you couldn't sustain the losses from a personal point of view that BFI was sustaining when you got up there and you looked at the books. It wasn't a good investment for you?

A As far as I—I did get it out of the—out of the red.

Q No. I'm not asking you that.

A Oh.

Q You made a decision not to buy the company?

A That's correct.

Q Because it wasn't producing sufficient revenue to make it look like a good investment for you?

A That's correct.

. . . . .

[60] Q Now, when you came up here to look at this company, both as the new part-time district manager,

and as the person who might be interested in buying it, you didn't have any trouble at all figuring out whether or not this company was making money, did you?

A No.

Q It was pretty obvious. Right?

A That's right.

Q You just opened the books and you could see it?

A That's correct.

Q In fact, anybody who looked at these records could see that this company was not making money?

A That's correct.

Q Anybody at the region who looked at it could tell that. Correct?

A That's correct.

Q Anybody at the national headquarters who might look at it could tell it?

A That's correct.

Q It was clear as the nose on your face, this company in Burlington, at the prices it was charging, was [61] not making money, period?

. . . .

A That's true.

Q And you didn't have to be an accountant to figure that out?

A No.

. . . .

[62] Q Well, somewhere in the structure of BFI in the rules and the regulations the edict has gone out that the salesman—the district manager, if he wants to, can price underneath the goals in certain cases. Correct?

A Under the goals, but not at a loss, sir.

Q Well, you're not supposed to price at a loss?

A That's correct.

Q But when you went up to Burlington, it was clear that you could tell that they were operating at a loss?

A On some systems.

. . . .

# CLOSING ARGUMENTS (Plaintiffs' Closing Arguments)

[April 7, 1987]

. . . .

[86] THE COURT: All right, Mr. Hemley. You may proceed with argument.

MR. HEMLEY: Thank you, your Honor. Good afternoon, ladies and gentlemen. Last week you people concluded from the evidence which we've presented that Joseph Kelley's claims were true. They're no longer mere allegations. You people have found them to be fact.

You've found to be fact that from 1982 to 1984 BFI intentionally attempted to monopolize the roll-off trash disposal market in Burlington, Vermont, and to drive Joe Kelley out of business by illegally cutting his prices. That was the antitrust violation.

And you also found that in—at the same time you found BFI violated state law by intentionally and illegally [87] interfering with Kelley's business relations.

In short, as you have found, BFI tried to put Kelley out of business so that they could have the entire roll-off market to itself and charge whatever prices it wanted to.

BFI came to court and they tried to convince you of the contrary. They tried to claim that that didn't happen. They tried to claim that what we knew happened and what we alleged happened, never took place. And you people have found that not to be the case.

Now, today, it's my pleasure and my privilege to ask you to award damages. There are two kinds of damages, as the judge will tell you. And I've made a very simple chart here to describe them.

There are compensatory damages, which are damages that are intended to restore Joseph Kelley to the position he would be in had the illegal price cutting not taken place. And that's why they are called compensatory.



They're to compensate him. The judge will tell you that you are to award him the amount of lost profits that he suffered because of the antitrust violation and because of the state law violation.

I want to just say a word about that so it's not too confusing. There really is just one conduct here, and that was the illegal price cutting. It gave rise to two different kinds of violations, the federal law violation and the [88] state law violation. They are, in fact, separate violations, although the damages are the same for each one.

It's important, for a number of legal reasons, that you put down the number twice. And the judge will give you a form with which to do that, that you express, even if it's the same number, separately, the antitrust damages and the state law damages.

Now, one of the reasons that it's important is the Vermont law and the federal law are slightly different in some important respects. One way in which it's different is that under state law, we're entitled to interest on the amount of damages. And the judge will tell you how to compute the interest.

Now, the interest, the legal rate of interest, in Vermont is 12 percent. So, for example, if you found that the damages were \$70,000—I'm rounding it off from the \$68,000, the interest that you might find, and of course it's up to you, entirely up to you, would be 12 percent of \$70,000 times the number of years that these damages accrued during the period of time during which Mr. Kelley didn't have the money.

So it would be 12 percent times \$70,000 times three and a half years. Comes to about—on 70,000, that amount comes to a considerable amount of money. Comes to about \$28,000. And I'm sure you'll talk about that and [89] figure it out in the jury room.

The second kind of damages is called punitive damages. And punitive damages in this case are very, very im-

portant. And they are for a different purpose. They are intended to send a message, as the judge will tell you. This will be your opportunity to make a statement, for you six people to send a message back to Houston, send a message back to Wall Street to tell these people that the conduct that they engaged in is simply not acceptable, that you six people and people like you will not tolerate business tactics like that. That when you've found that this company intentionally tried to drive Joseph Kelley out of business by breaking the law, that that was something which can't be tolerated and it should never happen again. And the way you send that message to Houston and to Wall Street and to companies like BFI—

MR. McGRATH: Your Honor, I object to the reference to Wall Street. I don't know where Wall Street comes into this case.

THE COURT: Well, we'll sustain your objection. And we'll also instruct the jury that any statement made in argument, as we've said many times, to disregard what argument there is.

MR. HEMLEY: When I say Wall Street, I don't mean, obviously, the street in New York City with that name. [90] What I'm trying to say is to send a message not only to BFI, but to large companies like BFI that may do business in Vermont or anywhere else in the United States. It's a chance to make that perfectly clear. Now, I'll talk about that a little bit more in just a few minutes.

First, let me talk about compensatory damages. This is the amount that Kelley lost. Now, Peter Battelle—I think this is a fairly straightforward analysis, and let me just put that up. We'll see.

Back to what Peter Battelle testified about this morning. What he did was he took the amount of revenues that he determined Kelley lost, Kelco lost, at \$85 a job. He took those 1700 pulls, the 1700 jobs, on which BFI had priced below average variable costs, where they had

priced illegally, and he figured that Kelley would have had those jobs at \$85. And then he made some subtractions so that we wouldn't be entitled—we're not entitled just to the revenue. We're entitled just to the profit.

He took out the dump fees and he took out the costs that he determined Kelley would have incurred. Now, this is not an entirely parallel situation to the one that we analyzed last week, because what we're looking at here are costs that Kelley would have accrued. We're not concerned with BFI's costs now, and they're slightly different.

They don't appear on—what doesn't appear on that [91] sheet are numbers, which would have been zero. And maybe to be a little bit more precise, we should have put them on with a zero next to it. But as Peter Battelle talked about this morning, there's no additional selling expense because Joe Kelley was the salesman. So he wasn't going to hire a salesman to make these additional sales. So that's zero.

There's no additional administration expense. If there was additional bookkeeping, Muriel would have had to stay up a little bit later at night to accomplish it. It would have not been additional cost.

The truck depreciation, as Peter told you, had already been fully depreciated by Kelco, so that was not included either. And so the amount that he found was \$68,194.

Now, this presumes, of course, that Kelley would have gotten the jobs. And I think this was the subject of some of the cross examination, and also the subject of some of my examination. Why do we assume that Kelley would have gotten these jobs and not BFI?

Well, the question was put to Mr. Battelle, well, assume that BFI would have only charged the minimum legal price, \$72.77. Would Kelley have then gotten the job at \$85? Peter said, probably not.

Well, that's a very major assumption. It's like assuming that the moon is made out of green cheese, and then

[92] we could all go up and have lunch on the moon. It bears no particular relationship to reality.

Now, how do I know that? And why should you people believe me when I say that BFI would not have charged \$72.77? And the answer is simple. First of all, they didn't charge \$72.77. \$72.77 is the absolute minimum break-even point. That would be like being in business just for the fun of it. And we know that BFI—we heard Mr. McGrath talk at length during his summation last week how they were constantly stressing profit, profit profit. This is what he wanted you to believe last week when he was addressing you. And, in fact, the profit motive is what establishes the price.

Now, you don't have to simply take my word for it. You remember the testimony of John Verrochi? He sat up here. He was the fellow who came on after Mowbray and Coletti. This is what they were trying to convince you of last week, and the testimony hasn't changed just because we—they said we were trying to get Burlington to charge according to our price schedules. We didn't care if we didn't get the job. We had to charge the price that we needed in order to return the profit. If we lost the job, so be it. That's what they told you last week.

Now, after John Verrochi, now, the first couple of years were years in which they testified Mowbray didn't [93] know how to work the—didn't know how to work the schedules. Didn't know how to work the VEBINT. He didn't know what he was doing.

Then, of course, he dropped the prices down here in order to try to put Joe Kelley out of business. The instructive period is what happened once they got them on line with the BFI program. And, basically, what we're looking at here is what would the charge have been had they been charging a legal price? If they hadn't broken the law, what would they have charged?

Well, we can see that when John Verrochi got them—and Coletti got them to price the way they—the BFI



guidelines called for, they went up to \$157 and \$172, which is substantially higher than anything Joe Kelley would ever have charged.

Secondly, we look at the prices in Springfield, Vermont. It's the same market, the same costs, the same everything. The only thing that was different is that they weren't trying to put Joe Kelley out of business in Springfield because Joe didn't do business in Springfield. The price in Springfield was up. And you see from Peter Battelle's chart up there, it was \$147. And BFI obviously had to charge more, because at these prices and these prices, they were losing market share and they were losing money.

So Mr. McGrath, to stand up and ask Peter Battelle [94] to assume they would only charge \$72.77, may present a question that he has only one answer to, but it is not a question that's based on the facts of this case.

In this case we know that when BFI charged a legal price, they charged substantially higher. And I think it's perfectly reasonable for you to conclude that, based on that, Kelley would have gotten these jobs; that this was a very price-sensitive market.

Now, they also point to the market share. And there's a chart somewhere here that describes the market share.

What's important to keep in mind when you're looking at that chart is that that chart includes all of the revenues, all of the dollars that were gained when they were pricing low, and then it accumulated. They had a lot of jobs during that period of time, as these charts will show you. And their revenues were increasing, as this chart will show you.

BFI's prices were also increasing, and that's because they were getting so much—so many jobs at these low prices. So what you are looking at when you look at gross revenues is not just the new jobs, but all of the market share, based on gross revenues. So it's not fair—it's not a fair argument, I don't think, to compare that,

those figures, and say, well, Kelley would have only gotten 55 percent.

[95] The important thing is what percent would Kelley have gotten of new jobs, if BFI charged \$150 or 157 and Kelley charged \$85. That's the question. And I think that we can all, obviously, arrive at the same answer. He would have gotten all or substantially all of the jobs.

Now, the judge will tell you, and obviously it's something that we can all agree on in this courtroom. We can't be precise. And we have a number, \$68,192. I mean, we can't be precise and say to you, "BFI would not have gotten one, two, five, ten jobs." And we're asking you, and the judge will tell you, that in this kind of a case, the plaintiff has to get the benefit in these kinds of analyses, because you can't predict it with precision.

Now, I think that the number that Peter Battelle put up there, based on the prices that he expected Kelley to be charging, is actually more than fair to BFI. I say that for the following reasons: We know that there were jobs that continued after 1984, well on. And there are some jobs that continue on even today. We didn't count any of those jobs. We didn't ask for any money based on those jobs, even though we are losing profits today based on those jobs. We just gave them the benefit of those jobs.

Further, in doing the damage analysis, Peter tried to be very conservative. He used a 14 percent interest rate. We're only asking for the 12 percent on the money that we [96] are entitled to interest on. He used 20 containers and depreciated 20 containers, when, in reality, to do 16 pulls a week, you probably would only need 16 containers.

He used a half a driver when, in reality, you probably wouldn't need labor for a full half times to accomplish these jobs. And we did that on purpose. We were



really trying to avoid controversy over these things and to make it as clear as we could to you people that this was a reasonable amount. \$68,000 is probably somewhat low, but it's certain reasonable. It's in the ballpark.

Now, as I started to talk to you before about the other kind of damages, it's called punitive damages. And the law in Vermont gives a jury a very important power and a very important authority. Where a defendant has acted intentionally and has violated the law on purpose, the law permits a jury to deliver a message, very much like a sentencing judge, that this kind of illegal conduct will not be tolerated. And, as I said, a message that will be understood not just by BFI, but by any business who even thinks of engaging in this kind of tactic.

Now, what happened in this case and why should there be punitive damages in this case? In 1980 Joe Kelley went into competition with BFI. I'm not going to rehash the whole story, because you know it well enough.

When BFI couldn't buy him out at a truly lowball price, [97] they tried to force him out by cutting their prices. They tried to take over the entire market so that they could charge whatever they wanted.

You heard it from the various witnesses. They deliberately and they intentionally tried to drive Joe Kelley out. And as they said, to squish him like a bug.

And make no mistake about it, Mike Gustin, who you heard, not only through witnesses like Mowbray and Rudolph, but you also heard Butch Jones, you also heard Don Dunchus talk about the conversation in the Holiday Inn. He was the man who gave the order, and he is BFI.

And Bob Mowbray, who was BFI's man in Vermont, he did it. And this was consistent with BFI's corporate policies, the ones that were expressed in BFI's memos to regional vice presidents.

Just very quickly, to remind you, the two for one policy. "Our goal is to constantly increase both profit-

ability and the number of customers. Under no circumstances should we have to decrease." That was John Drury.

Another memo, "If a competitor hits us hard, we must concentrate aggressively on his customers immediately."

Another memo, "In a situation like this, that is to say, when we have to cut prices, we can consider the initial short-term lower price to be an investment."

That's the way they considered this practice, an [98] investment. And they need to be told that this is a bad investment, that they're going to lose money with this.

This is a company, the same company, which earlier told Joe Kelley when he was confronted with competition from Palisades, to cut the prices in half, drive him out of business, and then double the prices.

This is the company that sent Joe—that sent Richard Rudolph on a sales blitz. This is a company that ignored this letter from Joe Kelley's lawyer in 1982 advising them of the violation, long before we were in court.

This is the letter of which Tom Dooley, the regional vice president, the highest man in the northeast region, said, "We knew about it, but we chose to do nothing about it."

This is a company that speaks only one language, and that language is money talks. And in order for you to send them a message, send a message back to John Drury, it will have to be expressed in that language, in dollars, that's the way the law gives you the authority and the power to do it.

You people have an opportunity now to send a message back, a memo back, to John Drury that says, "If you want to do business in this state, BFI, you better play by the rules." A memo that says, "You better think twice before BFI tries to put someone else out of business just so you [99] 'can make more money in Houston.'"

A memo that says, "The next time someone writes you a letter and complains of predatory pricing, you better

take it seriously. You better not just throw it in the trash can."

And if you send that message to Houston, you can be sure that it will get out to all of BFI's regional vice presidents and all of its offices.

Now, I'm sure you will hear BFI claim that the so-called governing officers had nothing to do with this and there shouldn't be any punitive damages. This a predictable argument. But it simply does not hold water. I have made an outline here of the points which show the knowledge, the recklessness, and the ratification by BFI on different levels.

Number one, Mowbray is BFI. He is the person with ~~the~~ delegated authority to set prices. They describe him as BFI's frontline management. They can't separate themselves from him now.

Number two, Gustin is BFI. He is the divisional vice president. He is the man with the lawful authority to supervise Mowbray, who has the lawful authority to set prices.

You'll hear that language about lawfully delegated authority in the Court's charge.

[100] Drury, Thomas, Myers, and Farris are BFI. They were also officers and directors of BFI and BFI of Vermont. And they had a responsibility. It's not enough for them simply to turn their backs and say, "Hear no evil, see no evil, speak no evil. We didn't know what was going on."

BFI's highest officers ratified the acts of BFI of Vermont. You'll see, and this is Exhibit 58G, I think it is, that each year they would resolve that the official acts were ratified.

Now, it's not enough for them to say, "Well, we didn't know about the price cutting." If you believe that they didn't know about the price cutting, it's still not enough. Because they have to find out about it. BFI's policies inspired and encouraged the illegal attempt to drive

Kelco out of business. And these were the policies that I just had up on the board.

And, finally, and this is very important, BFI's highest officers recklessly disregarded the complaint from Kelco's attorneys. And as Tom Dooley, regional vice president, said, "We knew about it, but we did nothing."

They had that letter in their possession and they took absolutely no steps to investigate or stop it. It was business as usual.

Well, what about amount of punitive damages should be given in this case? What size of punitive damage award will [101] it take to deliver a message to Houston? And I warn you in advance of even showing you this that these numbers are huge. And they're not huge because we are talking to me. We're not sending a message to me, not sending a message to you. We're sending a message to a company that grossed \$1,300,000,000 last year and predicts it will gross \$2 billion by 1990.

Now, I've done a chart here, and these numbers will speak pretty much for themselves. The company grossed \$1,300,000,000 last year. That's \$100 million every single month. That's \$25 million per week. Just since we've been here, this company has received approximately \$75 million in its treasury.

It's \$625,000 per hour. Now, I don't mean to be cute with this illustration, but to give you an idea of how big a billion is, there are 60 seconds in a minute, 3600 seconds in an hour, one million seconds in 11.5 days. One billion seconds is 31.7 years. We are talking big, big numbers.

So how do you make an impression on a company like this? Well, I have another illustration. Let's assume that a man came to you and he grossed \$20,000. And he said—he had done what this company had done. Now, of course, BFI grosses \$1,300,000,000. If you fined that man \$1,000, that would be the equivalent of a \$65 million fine on BFI. \$500, \$32,500,000. A \$200 fine, which would



[102] certainly not be too much to a man grossing \$20,000, would result in a \$13 million award.

Now, I am just putting these numbers up before you. I am not telling—I don't want you to think that I am soliciting any particular amount, because I'm not. The judge will tell you it is up to you. You have to decide what amount will be the right amount to send this message, not only to BFI, but to any other big company that even thinks of engaging in this kind of practice. And I'll leave you with one thought at this point.

We talked about \$70,000 in losses, \$70,000. \$70,000 is, if you can believe it, five one-thousandths of 1 percent of what this company earns, what this company grosses. It is the equivalent of saying to this man who makes \$20,000, "We're going to penalize you \$1.07." And they would be laughing in Houston if that's what they got. They would be chuckling to themselves about a job well done.

They would be able, every time someone accused them as Joe Kelley did, to send in a team of five lawyers and accuse us, as they did in their summation, of cooking up all the evidence.

THE COURT: I remind you, you have five minutes.

MR. HEMLEY: Thank you, your Honor.

And that is simply not acceptable.

I point again to the illustration, and I think that [103] the numbers will speak for themselves. You'll have all of these numbers in the jury room.

I think this is a very serious case, one in which we have already determined that there was illegal conduct, deliberate illegal efforts to drive a man out of business. And I think that in this case you people have this responsibility. You have this opportunity. And I know that you will use it wisely.

This will be your opportunity to make this statement so that other businesses will learn from this experience and not just laugh at us.

Thank you.

(Defendants' Closing Argument)

MR. McGRATH: If I could have just a minute to change the scene, your Honor.

THE COURT: I don't put the timer on until you're ready.

MR. McGRATH: I believe I'm ready, your Honor.

Good afternoon, ladies and gentlemen. Again, I appreciate the opportunity to talk to you this afternoon. And, again, on behalf of my colleagues, I appreciate your diligence and your attention at this somewhat shorter version of the trial today.

I am, obviously, only speaking about damages this afternoon, as Mr. Hemley was only speaking about damages.

And I would like to start out agreeing with several [104] things that Mr. Hemley said. I hope this doesn't shock you too much. But just to put it into a framework, obviously, there are two different things we're talking about here. There is a federal antitrust claim and there is a state claim. But we both agree that on each of those, on the compensatory damages, you need to answer that question both for the antitrust claim and the compensatory damage claim. And, also, presumably, the number would be the same for either because what's alleged is the same.

The interest number only applies to the state claim, as his Honor will instruct you. But, otherwise, what's charged here, what's claimed, is the same thing; that is, pricing below certain cost levels, the level you've heard over and over again now, average variable costs.

And the reason that I wanted to start out with that point is that when I go through my thoughts about compensatory damages, I'm not going to distinguish between this antitrust claim and the state claim because I believe that if there were lost profits, it was the same amount for the federal claims, the same amount for the state claim.

Obviously, I don't start out with the assumption that there were lost profits. But what I'm saying is whether



the number was zero or whether the number was 68,000, we're talking about the same number.

The claim of the plaintiff, if I can sort of [105] capsulize it, and, again, I think you will hear all the same words you heard from Mr. Hemley, were that there were certain jobs, roughly 1743, I suppose, pulls, so called, pickups, and dumps that are in question here. And the claim is that on those jobs, involving construction companies, roofing companies, companies like Velan Valve, that the defendants violated the law by charging below their average variable costs.

Now, we spent a number of days last week and the week before arguing about where the defendant's prices were. You, obviously, found last week that the defendant's prices were someplace below their average variable costs. So, obviously, we accept that for the purposes of this argument. And I'm starting out there, so that that's the claim. The claim is that the defendant priced below its average variable costs on those jobs or some of those jobs. And that if the defendant had not done that, if BFI had not done that, some of the jobs, at least, would have gone to Kelco. And, presumably, they argue they would have made some money on those jobs. So that the amount that BFI would be liable for would be their profit on the jobs that Kelco would have gotten had BFI not charged below average variable costs.

The plaintiff spent the morning putting in evidence on this subject that really was the sole subject of [106] the testimony this morning. We chose not to, because the materials that came in through their witness, through the other exhibits and evidence, were the ones that we rely on for this same purpose. And our position on compensatory damages is, basically, that the damage theory of the plaintiffs does not make any sense, and that, in fact, their claim does not stand up.

Let me just go through the basic reasons why I say that. And my basic reasons are a summary of my cross examination this morning of Professor Battelle.

In the first place, as I said before, I believe, indeed, I know, that only claim of wrongdoing before you is that the defendant, BFI, charged below variable costs in this market, in the roll-off business.

This isn't a libel case. It isn't a slander case. It isn't an assault case. The only claim was that the defendant charged below variable costs. The average variable costs found by Professor Battelle, after his study, was \$72.77.

Now, obviously, we argued for a week about what the figure would be for the purposes of this morning. I'm just assuming that BFI's average variable costs were \$72.77. Obviously, I have no idea what you found in your deliberations. But we picked that number because it's on that chart over there. It's the number that Professor [107] Battelle found.

The Court instructed it was only prices below that level that could violate the law. Any price above that level was not predatory pricing, was perfectly normal, lawful price competition.

And, obviously, price competition in our scheme of things is important. And, thus, my first suggestion to you is that in considering what prices BFI would have charged if its prices were all lawful, again on these 1700 jobs—that's what we're talking about here—the only appropriate assumption is that it was charging at its average variable cost because of this reason: If you assume that they charged above the average variable cost and that plaintiffs can base a damage theory on that claim, what you are doing is you are penalizing BFI. You are finding damages on the basis of prices that are way above the lawful level.

You are penalizing lawful price competition. If the BFI managers in October of 1982 said, "Let's compete hard with Kelco. We know our average variable costs are \$72.77. We've just retained Peter Battelle, the world's greatest expert on the subject," and they charged

\$72.77, whatever their intention was, that would be lawful. And if you penalize a company for charging down to the lawful level, if you find damages on the theory that they should have [108] charged at \$80 or \$100 or \$175, like Mr. Hemley said, what you do is you directly penalize price competition and you push a market to the state that this market is in today with no competition, with Kelco not even soliciting the customers of the company that BFI sold out to.

Now, if you adopt that assumption, which I'm suggesting is the only appropriate one, then if you believe Professor Battelle that Kelco, under no circumstances, would have charged below \$85, it's clear there are no damages. He admitted that in the first question and answer when I examined him. And his reason is unless Kelco's prices are down at the level or around the level of BFI's or below, not going to get much, if any, of the business. This is a price-sensitive market.

The commercial world tends to decide on what garbage companies to use on the basis of price. There may be exceptions, there always may be some company out there that's had a bad experience. Maybe you've had that happen where somebody you won't deal with, regardless of price, but I think both sides agree that by and large the company with the lower price is going to get the business.

What if you don't make that assumption? What if you assume that, yes, BFI was at the lawful price of \$72.77, that, in fact, Kelco was not going to roll over and play dead, they were going to compete with them? They were going [109] to get off their \$85 fixed price and they were going lower?

Well, you heard the testimony from Dr. Battelle this morning that if you look at the actual books and records of Kelco from the period in time, the ones that were done by their own accounting firm, and that at least nobody here has suggested are inaccurate in any respect, the actual costs per pull of Kelco were about \$3.50 above

BFI. So that if they actually met BFI's lawful price, they could not have made money at that level.

The only arguments that Dr. Battelle made to suggest that that was not the case was this computation he did showing that if Kelco got additional jobs, they got these 1700 additional jobs, they would have some additional costs, but not all of the additional costs that BFI would have had for the same jobs.

Now, I am not going to pretend these two companies are totally comparable. Obviously, they are not. If you have a family-run company, we all know that somebody in the family may work later if there's more work, they may take the afternoon off, if there's less work. And that is not so likely to happen in a corporation where there are things like overtime, et cetera.

But if you look at the G & A, the general administrative costs of Kelco, that is a very small part of their costs. If you look to the other costs that have nothing to do [110] with their being a business that is closely owned, those costs are really much larger and were all excluded by Dr. Battelle in his testimony this morning.

He did a total flip-flop between the testimony two weeks ago when it was handy to say that these costs should be included for BFI, and this morning. And I'll just remind you of the biggest example, because these are the biggest costs, the one was truck depreciation, which is a big cost in this business. Because obviously, the cost of the trucks is one of the biggest costs you have.

Two weeks ago he said that the more you use the truck, the more depreciation you have because the more you wear it out. Two weeks ago he said it was the same with the containers. You didn't hear that this morning. This morning he felt there would be no additional depreciation. There would be no additional depreciation on the existing truck, no additional depreciation on the existing containers.

You also heard two weeks ago that in the case of BFI, if they had more or less business, that their other ex-



penses would have varied. Their expenses for utilities and rent and so on. But when you saw the exhibit before, you did not see any of those numbers. You didn't see any of those variable costs. Even though, as Dr. Battelle himself said, the costs that he was talking about, the variable costs, were ones where the expenses will increase as you take on [111] additional business.

Where does this leave us? Let me ask this question. If you believe that BFI priced below average variable costs, and if you also believe that that led to some business going to BFI that otherwise would have gone to Kelco, and you also believe that if Kelco got more business they would have made some money on it, what do you do?

I would suggest you can't look at the plaintiffs' study that they put in evidence this morning, because it doesn't make any sense. Let me suggest a few reasons why. One is there were 1700 jobs in question, and Professor Battelle assumed that if BFI's prices had been above average variable costs, Kelco would have gotten 100 percent of those jobs..

I would suggest that that is preposterous, that Kelco would have gotten 100 percent of the jobs. We know, in fact, that during the year in question, after it's claimed the illegal price competition was going on, 1985, that of the business in that year BFI got \$230,000 and Kelco got \$288,000. And we know, in fact, that meant that Kelco got approximately 55 percent of that business and BFI got 44 percent of that business. That's what happened here. Different client—different customers went to different companies.

The only answer you heard this morning on that was that [112] some of the jobs that originated back in the damage period, which was alleged to be the six months when Mr. Mowbray was cutting prices in late 1982 and early 1983, continued on to this later period and that, therefore, you can't take those figures seriously.

Well, that sounds good, but if you actually, when you're in the jury room, look at Exhibit 113, which is the list of those jobs, you will find that one thing was very accurate that Dr. Battelle said this morning; and that is—and he said it also last week—that his recollection was that only 7 to 9 of the jobs that were illegally priced during that Mowbray period continued into the later period.

Now, some of them have a number of pulls, so it's not 7 to 9 pulls. It's more pulls than that. But it is only a fraction of all the jobs listed on this exhibit. And it is even a much smaller fraction of all the jobs in the marketplace.

In short, the submission that Kelco would have gotten 100 percent of these jobs is absolutely unbelievable. And I would suggest that if you are looking at some number and if you assume that the prices were not illegal, were set lawfully, and so on, that the only number in the record that makes any sense at all as an assumption is the 55 percent I don't know of any other number in the record that reflects reality on that question.

[113] And if you assume that Kelco would have gotten 55 percent of these jobs during the period in question, then how do you decide what they would have priced the jobs at? Well, I would suggest you can't assume that they would have gotten 55 percent of the jobs if they priced them way above BFI. They had to have priced them at least down to roughly the level of BFI, maybe below.

And if you start out with the assumption that the only appropriate thing is to assume that BFI charged at \$72 and assume, therefore, that Kelco had to have charged no higher than that, you come to the figure of \$98,000 in lost revenues that Dr. Battelle agreed with the mathematics of this morning.

Now, how do you decide how much profit Kelco would have made on this \$98,000? Well, I don't think you need to go through some complicated line of argument about



which costs really are variable and which costs are not. That is obviously a tremendously difficult area for counting. I would suggest that what you do is you look at the actual books and records of Kelco. And as Dr. Battelle and I agreed this morning, Kelco's actual profit level, operating profit level, during those two years in question was 9 percent.

Now, that operating profit level excludes some of their expenses. It excludes their interest expense, in particular. [114] And, thus, it is—it is, from our point of view, a conservative number. In other words, it overstates their profitability. It's giving something to the other side.

What I'm suggesting, however, is that if you use that 9 percent figure, 9 percent profit figure, which I think is overly generous, and there's no reason in this record to suggest that they or any other company in this business would have done better than 9 percent, that would give them lost profits of \$9800.

The only other alternative is that BFI simply would have stopped competing in this market. Well, if they stopped competing in the market, they simply would have been out of business early, and that assumption really makes no sense.

In short, what I'm really suggesting is that the damage study put in by the plaintiff does not support any compensatory damages at all. I am not suggesting this alternative theory because I think there were any damages. I'm just saying if you were looking for an alternative, that is at least one that bears some resemblance to reality.

Now, let me move on to the question of punitive damages. And, again, I told you I was going to agree with two things that Mr. Hemley said. This is the second one. The punitive damage claim applies only to the state law [115] claim. It does not apply to the federal law claim, as the Court will instruct you.

You haven't heard much during this trial about the state law claims. Most of the talk has been about the

federal antitrust claim. The state claim has kind of been the one—sort of the tail that's wagged the dog, as it were.

You've got to find, if you're going to levy punitive damages in this case, as the Court will instruct, it isn't enough to find simply that the law was violated, simply that there was this interference with customer contacts. The Court's language, obviously, will control, but I think you'll hear him talk about something beyond that, including actual malice. And the reason for that is that the violation of law we're talking about, the so-called tort, means something more than just an intentional violation of the law. It's something rising to the level of that which requires punishment, not just to compensate somebody injured, but to actually punish.

What I would like to do is to suggest a variety of reasons why punishment in this case by giving a bonus to the plaintiff is not appropriate. The first reason doesn't go to any statistics, doesn't go to any theories, goes to what really happened here.

There is no doubt, I don't think, in anybody's mind that there was a certain amount of hostility back and forth [116] between these two companies, a certain amount of bad blood. We heard from several witnesses that the plaintiff was, on a number of occasions, prone to threaten that he was going to drive BFI out of business. He did it to Mr. Mowbray when Mr. Mowbray was trying to discuss the sale of the business to him. There isn't any doubt that that was a continuous thing.

There isn't any doubt that Mr. Mowbray reacted to it, brought it to the attention of Mr. Gustin, at least, perhaps others. We don't know. And there also is no doubt that there was some tough talk.

Now, it does—if you'll think back—coincidentally, seem that every one of those tough talks appear to have taken place in a bar. It usually sounded like the Holiday Inn bar up in Burlington. And I would suggest that what really happened here was barroom talk with a plus.

There is no doubt that you have found, I assume, that after that tough talk there was some price cutting that went below average variable costs. I'm not arguing that. I assume you found that or we wouldn't be here today on this rainy day.

But let's look at what BFI actually did. First of all, as you heard over and over again, the low prices were not on all business. It was on some business, mostly so-called temporary accounts, construction accounts, roofing [117] accounts.

It lasted for six months. Mr. Mowbray, who on one of these charts is said to equal BFI, testified that he stopped it on his own. Why did he? Well, he testified he simply wanted to stop it on his own.

There was also a good deal of testimony that there was a continuous theme from Boston that he ought to get his profitability and his prices up. In any event, he voluntarily stopped it.

You didn't hear about any instructions to his predecessor—to his successor, the person who came after him, John Verrochi. Indeed, Verrochi testified that on day one he sat down, went over all the prices, and moved up all prices as quickly as he possibly could.

The damage to Kelco, A, was minor. My assertion, as already discussed with you, is there was none. But the kinds of numbers that Mr. Hemley talked about at the end of his argument just don't appear in this case. And in any event, in this trial, if there were any damages, they obviously are being dealt with.

There clearly was no damage to the public. If anything, during the period of price competition all the consumers in this market were better off. Certainly better off than they are in the market today when BFI's not in the market.

[118] And one other thing, which sort of overrides all this is who was hurt the most? It looks like BFI really was.

Now, you can say they shot themselves in the foot, but both experts said that in their view, the pricing pattern followed by Mr. Mowbray and his cousin, Mr. Rudolph, probably was a significant factor in leading BFI to conclude that they couldn't make it in this market, and they would get out of the market, lose their investment in the market.

Now, let's talk about BFI overall. You heard in the video tape of the deposition of the president of BFI, at least I hope you heard, the sound was a little difficult, but part of it dealt with the overall corporate antitrust policy. And, it was perfectly clear in that testimony that BFI has a strict overall antitrust policy; and that as a part of that policy, deals with predatory pricing and that it is contrary to the company policy to charge below cost, not just below average variable cost, but below cost, below any cost.

THE COURT: Got about five more minutes, Mr. McGrath.

MR. McGRATH: And if you look at the various Drury letters that Mr. Hemley likes to read to you, in every single one of them the theme is profitability, not reducing prices below cost.

There is no suggestion any place in this record that [119] anybody other than the couple of individuals involved in the personal animosity could have conceivably known of the price cutting on these temporary jobs.

And, indeed, as you saw in the first trial, the records that went to corporate headquarters showed that the profitability in this area was increasing.

As a matter of fairness, if you look at where the parties have ended up here, Kelco has succeeded. BFI is out of business and Kelco is getting whatever damages they are entitled to. Obviously, you decide what they're entitled to.

The amounts make sense. This market, after all, was a small geographic area where Mr. Mowbray operated.



The total revenues in any given year were \$400,000 to \$500,000. Little bit less in the beginning, around 500 in the last year.

Now, just to put that in context, even if you assume that somebody had all of the market and could have made a 10 percent profit after taxes, which is very high in this industry, that is only \$20,000 to \$30,000 a year. That's the ballpark we're talking about here. That's where the conduct in question happened, and that's the size of what we're talking about.

Did things happen that shouldn't have happened? You, obviously, have found that they did. There, obviously, [120] was some pricing that was, at the very least, unwise. And you have found it was below average variable costs. But to go beyond that and talk about punishment, I would suggest is inappropriate.

Thank you very much.

MR. HEMLEY: How much time do I have, your Honor?

THE COURT: Three minutes.

MR. HEMLEY: Beg pardon?

THE COURT: Three minutes.

MR. HEMLEY: Thank you.

Let me just address some of the arguments that Mr. McGrath has made. You know, it's one thing to have an attorney come in at the end of a case and speak to you in very calm and reasonable tones. Mr. McGrath is very polished and good at that. There's another thing for you to take yourselves and put yourselves back into what was actually happening in this case.

There wasn't minor damage done to Joe Kelley. There was an attempt to take away from Joe Kelley and Muriel Kelley their entire livelihoods. They say, "Well, Joe Kelley succeeded in this case." Joe Kelley succeeded in this case because he went to a lawyer who filed a lawsuit for him that told these people that they were going to be here in court.

That's the same argument that was made at the end of the [121] first case. The prices went up when we filed the lawsuit. That's when BFI finally got the message.

BFI wasn't already punished or already taken advantage of here. They sold out for \$285,000 without selling their equipment, just the accounts, to Trash Unlimited, with a deal that says they can come back into the market if Trash Unlimited misses any of the payments. And you can find that in the minutes. Don't take my word for it. That's twice what they offered Joe Kelley for his business.

And as I predicted, there was the suggestion, Well, Mowbray reduced the price. Mowbray did this, Mowbray did that. Don't fall for that. That wasn't Bob Mowbray who did it. It was Michael Gustin who told Mowbray to squish him like a bug.

It was Tom Dooley who got the message that the letter had been sent and said, "We're not going to do anything about it."

It was John Drury back in Houston, Texas, who said—and don't forget Mr. McGrath said you're talking about profits, profits, profits. He tells these people, "Consider the short-term lower price to be an investment which will pay dividends in the future." That's the policy that inspired this.

What that message is is just what they told Joe Kelley when he was confronted with Palisades, "Cut your prices" [122] "in half, drive him out of business, and then double your prices."

Now, this case, I think, and I hope that you'll agree with me, calls for some punishment. Not to punish a company just for the sake of it, but to send them a message. Not to do anything other than to make it clear to this company and others like it that this kind of behavior won't be tolerated.

Don't forget all the testimony that took place last week. Don't forget that what BFI did was they made a concerted effort to deprive Joe and Muriel Kelley of their



livelihood because they're big, because they thought they could get away with it. And they ignored the first letter from the lawyer. They acted like it was nothing. And then only when the lawyers filed a lawsuit did they finally realize that maybe they ought to get a grip on themselves and try to operate in a legal manner.

Now, I'll just spend a moment on the compensatory damages. Our theory doesn't penalize lawful price competition. What the judge will tell you is what we're trying to do is understand where would Joe Kelley have been if there hadn't been a violation of the law. That is the key.

And the key is, if they had priced according to their policies, he would have gotten the business, every last job. [123] Of course not. But we added—in order to make up for that, we didn't talk about the jobs that have continued. And I've explained that in my opening summation.

Mr. McGrath's entire summation on compensatory damages is premised on the proposition that BFI would have charged \$72.77. That makes no sense at all. They're not in business or they weren't in business, if they were operating legally, to simply break even. And to accept that would be, I think, kind of silly. And if you reject it, then you reject his entire argument.

THE COURT: You've substantially used up your time, Mr. Hemley.

MR. HEMLEY: Just one moment if I can, your Honor.

What happened after the prices went up? Kelley got substantially all of the jobs. You can see that from BFI's prices, obviously.

I could respond to the other arguments, but I've run out of time. I'd ask you to make these arguments for me. I think this is a case that warrants compensatory damages, and it also warrants a very strong message to BFI.

Thank you.

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## COURT'S CHARGE TO THE JURY ON LIABILITY

[March 31, 1987]

. . . . .

[70] You should then go on to consider the plaintiffs' state law claim. As I have said, in addition to the plaintiff claim under the antitrust laws, the plaintiff also has alleged a claim that the defendants are liable under state law for intentionally interfering with existing and prospective contractual relations between Kelco and its customers.

To prove this claim the plaintiff must show by a preponderance of the evidence, as I have described it to you before, that: 1. The plaintiff had existing or prospective business relationships; 2. That defendants interfered with those relationships; 3. That the interference was intentional; and 4. That the interference was improper.

The plaintiff claims and contends that the defendants intentionally offered illegally low prices to existing and potential Kelco customers, and as a result of which those customers utilized the defendants' services and Kelco lost business.

You may find that the defendants intended to interfere, if you find that they actually desired to do so or if you find that they knew interference would result from their actions and they recklessly disregarded that concept.

[71] Even if they intended to take away business from the plaintiff, however, the defendants are not liable unless the interference was improper. In this case the plaintiff claims the defendants' interference was improper because their prices were below their average variable costs.

The question, therefore, requires the same analysis that I explained earlier in relation to predatory pricing element of the antitrust claim.

The purpose of this requirement is to allow companies to woo prospective customers away from their competitors by fair and reasonable means, but to prevent competition, that is unfair and illegal.

Therefore, you should find the defendants liable under this claim only if they intentionally and improperly interfered with Kelco's relations with its customers.

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

Civil Action No. 84-180

KELCO DISPOSAL, INC., and JOSEPH KELLEY

v.

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., and  
BROWNING-FERRIS INDUSTRIES, INC.

INTERROGATORIES

*Antitrust Claim*

1. Do you find that defendants had a specific intent to obtain monopoly power in the relevant market?

Yes ☒

No

[If your answer is no, go on to Question 5]

2. If so, do you find that defendants attempted to obtain this monopoly power by predatory pricing?

Yes ☒

No

[If your answer is no, go on to Question 5]

3. If so, do you find that there was a dangerous probability that defendants would succeed in obtaining monopoly power?

Yes ☒

No

[If your answer is no, go on to Question 5]

4. If so, do you find that defendants' attempt was a legal or proximate cause of injury to the plaintiff?

Yes ☒

No

[If your answer is no, go on to Question 5]

*State Law Claim*

5. Do you find that defendants intentionally and improperly interfered with the plaintiff's business relationship with any of its existing or prospective customers?

Yes ☒

No

Your foreperson should sign and date these interrogatories and the appropriate verdict form.

/s/ [Illegible]  
Foreperson

31 March 1987  
Date

. . . . .

UNITED STATES DISTRICT COURT  
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Civil Action File No. 84-180

KELCO DISPOSAL, INC. and JOSEPH KELLEY

v.

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BROWNING-FERRIS INDUSTRIES, INC.

**ORDER**

On April 2 and 3, respectively, plaintiff and defendants filed memoranda on the admissibility of other cases evidence on the issue of punitive damages. We treat this issue as a motion in limine by defendants to exclude the evidence of other cases from the damages portion of this action.

Plaintiff alleges that evidence of anticompetitive acts by BFI in other parts of the country is relevant to an element of their punitive damages claim under Vermont law, BFI's intent and motive. While we agree that defendants' intent and motive is clearly relevant to the issue of punitive damages, see *Lancour v. Herald and Globe Assoc.*, 112 Vt. 471 (1942); *Glidden v. Skinner*, 142 Vt. 644 (1983), we do not agree that the evidence plaintiff seeks to present here is relevant to that intent and motive. Alleged acts of bribery, price-fixing, and even predatory pricing in Houston, Pittsburgh, Atlanta, and Toledo are far-removed from actions [1039] interfering with customer relations in Vermont. The cases



plaintiff cites are not convincing on this point because they either deal with additional acts by a defendant against the same plaintiff or acts against other individuals that are part of a common or closely related scheme. See, e.g., *Devine v. Rand*, 38 Vt. 237 (1866); *United States v. Smith*, 727 F.2d 214 (2d Cir. 1984). In this case, the evidence plaintiff seeks to admit has no such connection with the actions here in Vermont. Therefore, we find that the evidence is not relevant and is excluded. In addition, even if the evidence is minimally relevant, we exercise our discretion under Fed. R. Evid. 403 and exclude the evidence because its probative value is substantially outweighed by the danger of confusion of the issues and misleading the jury.

For the reasons stated above, defendants' motion in limine is GRANTED. Plaintiff's evidence of alleged misconduct in other jurisdictions is excluded.

SO ORDERED.

Dated at Rutland in the District of Vermont this 3rd day of April, 1987.

/s/ Franklin S. Billings, Jr.  
FRANKLIN S. BILLINGS, JR.  
District Judge

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# PETITIONERS' REQUESTED JURY INSTRUCTION ON PUNITIVE DAMAGE

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*Defendants' Proposed Damages Instruction No. 4*

## PUNITIVE DAMAGES

Plaintiff is seeking to recover punitive damages against BFI on plaintiff's unfair competition claim. Only if you find that plaintiff has suffered some actual damage on accounts of the defendants' intentional interference may you consider the question of punitive damages. Punitive damages are intended to punish a defendant and to deter it and others from similar conduct in the future.

In order for plaintiffs to recover punitive damages, it is not enough that BFI's acts have been found by you to be unlawful. Rather, you must find that BFI acted with actual malice. In order to find actual malice, you should examine whether BFI's conduct towards Kelco was outrageous or that its conduct showed a reckless and wanton disregard of plaintiff's rights.

The fact that the defendant is a corporation does not prevent an award of punitive damages. However, you must find that the malice relied upon by plaintiffs was that of the governing officers of the defendant unlawfully asserting their authority. If the act relied upon is that of a servant or agent, plaintiffs must show by clear and convincing evidence that the governing officers either directed the act, participated in it, or subsequently ratified it. A corporation cannot ratify the act of a servant or agent unless it has full knowledge of the material facts and the acts it is supposedly ratifying.

[1048] If you determine that the defendant acted with actual malice and you believe that an award of punitive

damages is appropriate, then you should consider the amount of punitive damages to be awarded, if any. In determining the amount, you may consider the nature of the defendants' conduct, and length of time that conduct engaged in such conduct, and the fact that defendant ceased in such conduct.

*Lanfranconi v. Tidewater Oil Company*, 376 F.2d 91, 96 (2d Cir., 1967); *MacMillian Co. v. I.V.O.W. Corporation*, 495 F. Supp. 1134, 1147 (D. Vt., 1980); *Shortle v. Central Vermont Public Service Corp.*, 399 A.2d 517, 518 (1979); *Lent v. Huntoon*, 470 A.2d 1162, 1170 (1983); *Glidden v. Skinner*, 458 A.2d 1142, 1144 (1983); *Sparrow v. Vermont Savings Bank*, 112 A.2d 205, 207 (1921); *Westinghouse Elec. Supply Co. v. L.B. Allen*, 413 A.2d 122, 129 (1980); *In re Wright*, 310 A.2d 1, 11 (1973); *Restatement of Torts (Second)*, § 908(2).

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## CHARGE TO THE JURY ON DAMAGES

[April 7, 1987]

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[123] THE COURT: Ladies and gentlemen of the jury, I'm certain you remember this is a civil action in which the plaintiff, Kelco Disposal, Inc., seeks to recover money damages from the defendants, Browning-Ferris Industries of [124] Vermont and Browning-Ferris Industries, Inc., who, for the purposes of this trial are treated as one entity, for a violation of the federal antitrust laws and the Vermont law on unfair competition.

In the first part of this trial you found the defendants liable to the plaintiff under both the federal and state laws. You must now determine how much money to award the plaintiff for defendant's activities.

Before I explain to you the law on damages, I want to remind you again of certain rules by which you are to assess the evidence that you have seen and heard in this case.

The first rule concerns the burden of proof. The party who has the burden of proof must establish its claim on a particular question or issue by a preponderance of the evidence. Preponderance of the evidence means that the evidence presented on one side of the question or issue convinces you that the matter sought to be proven is more likely true than not true. It's a matter of quality, not quantity, and means that the evidence on one side has greater persuasive value.

The second rule concerns the credibility of witnesses. You do not have to accept all the evidence presented as true or accurate. Instead, it is your job to determine the credibility or believability of the witnesses. You do [125] not have to give the same weight to the testimony of each witness that you have heard. You may accept or reject the testimony in whole or in part.

The weight of the evidence is not determined—but, actually, in this part of the trial there was only one witness. So it is not a question of the number of witnesses testifying on one side or another.

But you should consider in weighing the testimony of the witness, his candor, his interest, if any, in the outcome of the case, his manner of testifying, and the extent to which other evidence in the case supports or contradicts his testimony.

The last rule that I want to bring to your attention again is the—concerns the testimony of the expert witness. And in this portion of the trial, as you know, we only had one witness, which was Peter Battelle. And he is known as an expert witness.

An expert is a person who, by reason of special study, training or experience, has superior knowledge about a certain subject. And in evaluating the testimony of that expert witness, you should consider his honesty, his ability, the facts that he used to form his opinion, and his opportunity to observe the facts that he relied upon. And you should weigh this expert testimony with all other evidence in this case.

[126] The weight to assign to the expert testimony is solely for you to decide.

As I've said a number of times, and I caution you again, that you should disregard any testimony that has been excluded or stricken from the record. And, likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence.

At times I may have sustained objections to questions or instructed that an answer be stricken, and you should disregard that answer. And you may not draw any inference from those unanswered questions or stricken answers.

The evidence that you will consider in reaching your verdict in this portion of the case consists of the sworn testimony of the witnesses and all exhibits that have been received into evidence. On this basis of this evidence, you will reach a fair and impartial verdict.

It is now my duty to give you instructions concerning the law that applies to this portion of the case. And it is your duty to follow the law as stated in these instructions. You must then apply these rules of law to the facts that you find from the evidence.

It is the sole province of the jury to determine the amount of damages in this case, and by these instructions I do not intend to indicate in any way how you should decide any question as to the amount of damages. And any [127] figures that the attorneys may have stated to you is not evidence and should not be regarded as such by you.

The purpose of damages in a suit of this sort is to put the plaintiff in as good a position as if the violations of law had not occurred. And in this case you have found the defendants liable under two different laws, the federal and the state law.

Throughout your consideration of the damage calculation, however, you should remember that damages are compensatory only. In other words, the plaintiff may be compensated only once for the injury that he has suffered. Because the state law unfair competition claim is legally distinct from the antitrust claim, you should consider the damage award for each of the two claims separately.

In the special interrogatories I will give you, I will ask you to list the damage—the damage award, if any, separately for each claim.

If you find that the damages for both claims are the same and resulted from the same conduct on the part of defendants, you should list the amount under both the antitrust and unfair competition claims. You needn't worry about giving double damages or double recovery, because I will take care of that problem as a matter of law.

Although you must determine separately the amount of damages under each claim, the legal standard you will



use [128] to evaluate compensatory damages is the same for each claim.

The plaintiff carries the burden of proving by a preponderance of the evidence every element of damage it seeks to recover. Further, the plaintiff may recover damages only for the harm that is proximately or legally caused by the defendant.

The proximate cause of damage means that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produced the damage and without which the result would not have occurred. Damage is proximately caused by an act or a failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually caused the damage, and the damage was either a direct result or a reasonably probable consequence of the act.

The test for damages here is a simple one. If you find that the plaintiff lost profits on account or—for a customer as to which it had a reasonable expectancy of profit and that this loss was a result of the defendant's illegal conduct, then you must award damages to the plaintiff and against the defendants in the total amount of the lost profits, if any.

Lost profits means lost net profits, which are [129] determined by subtracting the costs of the expenses of a business from its gross revenues.

The plaintiff may not recover for damages that are based on conjecture, speculation or guesswork. However, the fact that the precise amount of plaintiff's damages may be difficult to ascertain should not affect the plaintiff's recovery, particularly if the defendant's wrongdoing caused the difficulty in determining the price—the precise amount.

In other words, the plaintiff need not prove the profits it would have earned with certainty. The plaintiff need only show a sufficient basis for a reasonable estimate of whether it would have earned some profits.

In determining the specific amount of damages to award, you should consider all the evidence you have heard, using the guidelines that I have given you. And the final figure, however, is for you to decide, and you alone.

Under either claim, the federal or the state, if you find, based on the evidence, that there was no reasonable basis for estimating damage or, in other words, profit, you may find for the plaintiff in some nominal sum such as \$1.

Hère, in addition, the plaintiff seeks, in addition to compensatory damages, punitive damages. Only under the state law claim, which is provided by our statutes and our [130] cases, permits the jury under certain circumstances to award the injured person punitive damages to punish the wrongdoer for some extraordinary misconduct, outrageous misconduct, or to serve as an example or warning to others not to engage in such conduct.

Therefore, under the state claim you may award damages, punitive damages, if you find compensatory damages under that claim, even if there was only minimal compensatory damages. You may not award punitive damages under the federal claim.

If you believe that the defendant's conduct revealed actual malice, outrageous conduct, or constituted a willful and wanton or reckless disregard of the plaintiff's rights, then and only then may you award the plaintiff a sum for punitive damages.

In order for you to award punitive damages, the plaintiff must prove by clear and convincing evidence that the defendants acted with actual malice or willfully and wantonly or with reckless disregard for the plaintiff's rights.

In determining the amount of punitive damages, if any, you may take into account the character of the defendants, their financial standing, and the nature of their acts.

Because the defendants are corporations, you may punish them for the acts of their employees, only if those [131] employees were governing officers or management acting as officers of the corporation or if the governing officers or managers, acting under their authority, directed, authorized or ratified the acts.

On the state claim, and only on the state claim, you may also add to the compensatory damages a sum of interest at a rate of 12 percent per annum for the time between the plaintiff's losses and the present payment time.

Under all of these claims there will be no state or federal income taxes on any of the damages you award and, therefore, you should include no compensation as such in your verdict for such.

The clerk will give you a copy of the interrogatory forms which we will submit to you so that we may go over the same.

You will note that the first question asks, "What is the amount of compensatory damages to which the plaintiff is entitled as a proximate result of the defendant's actions in violation of the federal antitrust laws?" And you will insert in the space provided the figure that you determine under the evidence.

Second, "What is the amount of compensatory damages to which the plaintiff is entitled as a proximate result of the defendant's actions in violation of the Vermont law [132] "on unfair competition?" And, likewise, there is a space provided for you to insert any figure that you shall find from the evidence.

And, three, you must answer, "Do you wish to award the plaintiff punitive damages for the defendant's violation of Vermont law?" And your foreperson will check yes or no.

Obviously, if you answer "No," you do not answer any other—you do not fill in the next question or blank.

If you answer "Yes," then you must insert in that space the amount that you so determine.

Your foreperson will then sign the interrogatory form and date it. Your forms at the bottom do not have a place for the foreperson to sign and date. Something happened to the word processor, but mine does and yours will.

You will also be given one verdict form, a verdict for the plaintiff, and under that form you will insert in the places provided—there are three, three blanks, one on the antitrust claim, two, on the state law claim, and, three, as to punitive damages. And your foreperson will put in the figures that you find from the interrogatories in the appropriate blanks on the verdict form and will, likewise, sign and date the form.

To return a verdict all jurors must agree to the [133] verdict. In other words, it must be unanimous.

And upon retiring to the jury room, your foreperson will preside over your deliberations and be your spokesperson here in court.

I again remind you that when you have reached a unanimous verdict, you should sign the two forms that we have gone over.

If during your deliberations you desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the marshal. He will bring the message to my attention, and I will respond as quickly as possible, either in writing or by having you returned to court so that I may address you orally.

I caution you with regard to any message or question you might send that you never specify how you stand at that particular time on any issue.

Again I will appoint Mrs. Watts as your foreperson.

(The following took place at sidebar.)

THE COURT: Go ahead, Bob.

MR. HEMLEY: Thank you. First, your Honor, I would except to that portion of the charge where you instructed them about proximate cause. I believe they already found there was proximate cause in their first



interrogatories. I refer to Interrogatory 4, which said—asked them if they [134] found that the defendant attempted to monopolize—it was a legal or proximate cause of injury. So I don't think that that should be reopened at this time.

Secondly, on the taxation question—on the taxation question, where you instructed them that the recovery is not taxable, I think that under Section 186 of the Internal Revenue Code, there are some adverse tax consequences. Only certain portions of the recovery are deductible and others are not.

And, third, on the punitive damage charge, I don't think it was made clear that if the managing agents delegate their authority to employees, then that is a cause for finding punitive damages for the—against the corporation, that it acts through its officers and agents.

That's all I have.

MR. McGRATH: Your Honor, I have two points. One is on the proximate cause part of the charge. I guess I have the opposite reaction. I didn't think it made as clear as it might that the—that the recovery has to be for profits lost as a result of the defendant's unlawful conduct, and that's for the legal reason that I raised this morning.

The other point is on the punitive damage charge. I believe the charge said that the jury had to find actual malice—that they could award punitive damages if they [135] found actual malice or to serve as a warning to others. I think it left as sort of—

THE COURT: I didn't mean to say "or." Did I say "or"?

MR. McGRATH: Well, that's what we heard, your Honor. It sounded like you could, just as an independent basis, even if you didn't find malice or willfulness, you could just say, "Well, let's make a—let's make an example of the defendant."

THE COURT: Okay.

MR. McGRATH: That's all I have.

THE COURT: Okay. Thank you.

(The following took place in open court.)

THE COURT: I assume that you will check with the clerk as to the exhibits you desire to—have been admitted that go to the jury.

MR. HEMLEY: Yes.

MR. McGRATH: Yes, your Honor.

THE COURT: Very well. If the officer would come forward, he may be sworn.

(Rick Coolidge, court security officer, was sworn.)

THE COURT: The jury may have the case. The Court will stand in recess till the jury returns.

(There was a recess taken.)

(The following took place in chambers.)

[136] THE COURT: I have a question from the jury. I just wanted us all to agree how it should be answered. I think I know. But, anyhow, the question is, "If the jury wishes to award interest on damages under the Vermont law, should the calculations be included in the figure listed under Question 2 or should the figure upon which the interest calculations are based be listed the amount times the percentage per annum?"

It would be my understanding that it—the entire figure should be listed under the answer to Question 2.

MR. HEMLEY: In other words, they want to know should they make the mathematical calculation—

MR. McGRATH: I would think so.

MR. HEMLEY: Yeah.

THE COURT: That's what I would think. So rather than get the jury in, I would just write a note to the effect that it should be listed—the calculation should be included in the figure listed under 2.

MR. McGRATH: I would think so.

MR. HEMLEY: Yes. That's fine with me.

THE COURT: That's my understanding, but I just wanted to have anybody—

MR. McGRATH: Would they like to borrow either Bob's or my calculator?



MR. HEMLEY: Mine doesn't have enough zeros.

[137] THE COURT: Would you get Mrs. Maranville, please, Doug?

Would you just type out an item, Joyce, that—and we'll give it to them, "In answer to your question, the interest figure should be listed under Question 2"—well, wait a minute. Maybe I shouldn't say it that way.

MR. HEMLEY: To be included in the—

THE COURT: Yes. The interest figure should be included in the figure in your answer under Question 2.

And then you should mark this as a Court exhibit.

MRS. MARANVILLE: Do you want to sign that?

THE COURT: Yes. We'll send it back in.

MR. McGRATH: I assume they—didn't mean this to be on the record.

(There was a discussion off the record.)

THE COURT: Give this to the clerk and then we'll put it back in the record.

(The following took place in open court at 4:45 p.m.)

THE COURT: Thank you for your communication, ladies and gentlemen of the jury. We realize it may take some time, and you have a long way to travel, some of you. And so we'll recess now and ask you to come back tomorrow morning at 9:30.

When you come back, you should go directly to the jury room. When you're all there, the clerk will deliver — [138] I hope you'll seal the exhibits, those that you can, in there or anything, and then—and the forms, and then they will be delivered to you. And we'll secure the exhibits and the clerk will take those.

We will also warn you not to discuss the case, obviously, or attempt—I don't know if there's any media or not, but you shouldn't read any article, if there is any article, and not discuss it among yourselves or with anybody else until you resume your deliberations tomorrow.

We appreciate all your considerations, and we'll see you all tomorrow. Courts will stand in recess.

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# PLAINTIFF'S EXHIBIT 10

## BROWNING-FERRIS INDUSTRIES, INC. INTER-OFFICE LETTER

To: District Sales Managers  
Salesmen

From: Mike Gustin

Subject: Competitors List

Office: Northeast Region

Date: December 22, 1981

In an effort to better manage each district's market area effectively, I would like a "Competitors List" showing the worst competition you encounter in your immediate market place. Begin by listing your largest competitors first, downgrading to your smallest last. Also include how many trucks he is using and what systems.

Return this report back to me at the Region no later than January 15th, 1982.

WASTE SYSTEMS  
BROWNING-FERRIS INDUSTRIES

December 28, 1981

Mike Gustin  
Browning-Ferris Industries, Inc.  
100 Hallet Street  
Boston, Mass. 02124

Re: Competitors List

Dear Mike;

Below is a listing of the competitors in our market area.

*Rear loaders*

Bob Perry Trucking	4 trucks
Gauthier Trucking Co.	3 trucks
Barnier & Son's Trucking	3 trucks
Barnier's & Sons Trucking	2 trucks
Roland L. Booska & Sons	2 trucks
Dave's Trucking	1 truck
Gary's Trucking	1 truck
Miles Trucking	1 truck
Lee Brothers Trucking	1 truck
Gamelin's Carting Co.	1 truck
Nolin's Trucking	2 trucks

*Roll-Offs*

Kelco Disposal	2 trucks
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PLAINTIFF'S EXHIBIT 43

GRAVEL, SHEA & WRIGHT, LTD.

Attorneys at Law

P.O. Box 1049

Burlington, Vermont 09402

October 26, 1982

*CERTIFIED MAIL*

Merrick C. Walton, Esq.  
Browning-Ferris Industries, Inc.  
P.O. Box 3151  
Houston, TX 77001

Re: *Kelco Disposal, Inc.*

Dear Mr. Walton:

We represent Kelco Disposal, Inc., a waste removal company located in South Burlington, Vermont. We have been informed by Kelco that Browning-Ferris has eliminated "dumping fees" and rental charges for bins at construction sites in this region, in an attempt to force Kelco out of business.

We believe this action by Browning-Ferris violates state and federal pricing laws. Unless Browning-Ferris ceases to compete unfairly with Kelco immediately, we will initiate legal proceedings on behalf of Kelco.

Thank you for your attention to this matter.

Very truly yours,

GRAVEL, SHEA & WRIGHT, LTD.

/s/ Charles T. Shea

CHARLES T. SHEA

CTS:wnb

cc: Douglas Richards, Esq.

## PLAINTIFF'S EXHIBIT 47

BROWNING-FERRIS INDUSTRIES, INC.  
INTEROFFICE LETTER

June 25, 1980

To: Regional Vice Presidents

From: John Drury

Re: Market Share and Density

As you know, we have been talking for some time now about two very basic market-related policies:

- 1) Obtaining new business and increasing service to existing customers as quickly as possible; and
- 2) Making every effort to keep the loss of business as low as possible.

Obviously, both of these policies are to our advantage in that the profitability of the customers belongs to us. However, there is another advantage which following these policies provides and that advantage relates to Market Share.

When we obtain a new account in our existing service area, we also gain a density advantage over any competitor in that area. Besides providing us with immediately increased profitability, the addition of that customer serves to reduce our "Time Per Stop" through increased density. Conversely, when a competitor obtains an account within our service area, any competitive density advantage we may enjoy is diminished. Since our objective is to constantly increase our Market Share, we take at least one step backwards everytime a competitor gains an account.

Even though we may fully understand the importance of achieving a density advantage over our competition and continually increasing that advantage, there may be cases where we are unwittingly losing that advantage under the belief that we are strictly adhering to Corporate policy. These situations are possible when two conditions exist:

- 1) A competitor is willing to accept New Business at a rate he knows will produce minimum initial profit for him. His idea is that, once he has obtained the account, he will quickly raise the price to an acceptable level. His thinking is that it's easier to do this than to take an account away from us.
- 2) Our District has a Price List which is higher than the competitor's and we do not deviate from that Price List.

Where both of these conditions exist, we might very well have a potential Market Share problem, since many potential new customers may tend to opt for the lowest price offered—not being familiar with differences in quality of service.

In certain markets, a solution to this problem might very well be to meet the competitor's price in order to gain that customer. In these cases, prudence dictates that we would then attempt to raise the customer to an acceptable level as quickly as we deem practical. This does not necessarily mean that we must immediately raise him to our minimum acceptable profitability. It may be that we decide to raise the customer to an acceptable level through two or more well-timed price increases. The theory behind this practice is that, once the customer is meeting our minimum profit objectives, he will remain that way over the long-term. In a situation like this, we can consider the initial, short-term lower price to be an investment which will pay dividends in the future.



Naturally, before you would adopt any pricing policy changes, you must first carefully evaluate existing market conditions. Please review the new business and pricing policies of your districts to determine if the situation described above exists. If it does, we *must* take whatever steps are necessary to prevent competition from capturing new business through initial price discounts.

JED:ds

cc: Regional Sales Managers  
 Harry Phillips  
 Norman Myers  
 Ed Crane  
 Bill Johnson  
 Jerry Lynam  
 Steve Thomas

PLAINTIFF'S EXHIBIT 60B

CONFIDENTIAL

BROWNING-FERRIS INDUSTRIES  
 INTEROFFICE CORRESPONDENCE

August 20, 1982

To: Regional Vice Presidents

From: John Drury

Re: Lost Business

GENERAL

As you know, Lost Business has become an increasingly important problem for BFI. The impact on our revenues and profitability has been significant. From my point of view, we must make every effort in the coming fiscal year to reduce the loss of our business so that in this tightening economy BFI can continue to grow and to improve its profitability. We are working hard to improve sales, to obtain price increases, and to gain increases in service. Unfortunately, we see much of that work undermined by losses. Obviously, this situation must change.

We have discussed the lost business problem at some length on several occasions. We are at a point now where we have the opportunity to stop the large losses. We have a detailed report on the lost business problems found in many districts which are experiencing losses. We must use the findings and recommendations of the report to our advantage.

The full Lost Business Report is available upon request from John Bradley.

## MAJOR CONCLUSIONS

I drew the following major conclusions from the report:

1. We lack an aggressive and implemented plan to confront the lost business problem;
2. We have lacked strong field follow-up at the district level to the existing BFI Customer Relations and Business Retention Plan; and
3. We have a serious lost business problem and serious deficiencies in some regions.

We need to correct these deficiencies immediately at all levels.

Ed Crane will continue to take action on and develop plans for the implementation of the recommendations made in the report. He will also be charged with follow-up responsibility and reporting on his findings.

## IMMEDIATE REQUIREMENTS

There are some specific matters discussed in the report which warrant your immediate attention and action.

These matters are:

### 1. *Market Share*

Market share is the most important area for your attention. We have to increase our customer base. We cannot let our customer base go down. As you know, we plan to track this on a monthly basis.

If a competitor hits us hard, we must concentrate aggressively on his customers *immediately*. This should do two things; first, we should get more new customers than we lose; and second, we should force the competitor to spend more time protecting his customer base and spend less time selling to our customers.

## 2. *Management*

For the next fiscal year, I want each of you to give particular attention to lost business in your region. Without your personal attention we will not improve the present situation. The District Managers will do what you tell them to do and what you emphasize. You must take the lead in managing this corrective effort. You must set the standards.

District Manager involvement is needed immediately. I want District Managers to understand that lost business problems require their direct attention, not just the attention of their sales people. They need a greater sense of urgency. Consequently, District Managers should become personally involved with customers who call in to cancel service. This involvement should be in the form of direct contact, in person or by phone, with about 20-25% of these customers.

In addition, as an integral part of your normal, monthly review process, you should discuss with each District Manager both the current level of lost business activity and any patterns/trends with respect to that activity.

I expect Sales Managers to spend a minimum of three days a week in the field with their sales representatives in front of customers or prospecting for customers. Where the size of a sales force requires a Sales Supervisor, I expect each Supervisor to spend virtually all of his time working in the field with sales representatives. In this case, the Sales Manager should spend one or two days a week in the field with his representatives.

### 3. *Services*

It is now company policy that until proven wrong we treat "the customer as if he is always right." Please make sure that this is understood at all levels. This is an attitudinal policy which must be the backbone of all of our servicing activities in the field and in our offices. The customers pay all of our wages, benefits, and bonuses, and the customers pay the stockholders. As the economy tightens, it is even more important that we ensure that our customers get the services they pay for so that we do not lose them.

### 4. *Pricing*

Take every action necessary to secure our desired prices and to stay competitive. You have the necessary authority to establish flexible pricing levels to achieve our goals.

Our pricing goals are simple:

1. Price at the desired level to maintain overall 35% (Minimum) VEBINT levels; and
2. Price so as to be competitive in each market and to expand our customer base in each market.

In certain rare cases these goals may conflict and a decision by the Regional Vice President, Regional Sales Manager, and/or the District Manager may be necessary to maintain the proper strategy for that particular market.

### 5. *Customer Relations and Business Retention Programs*

Ed will improve these programs as field experience dictates, but this should not prevent full

implementation of the programs as they are now in the field. You should ensure that they are properly communicated to the field, that they are understood, and that they are implemented in every district.

We cannot improve the programs until they are completely in effect. If they are inadequate, the customer relations and business retention programs will be changed. We, however, cannot make any substantial changes until the current plan is fully operational.

I expect that you will make the current BFI Customer Relations/Business Retention Plan *your plan* and that the District Managers will make the current plan *their plan*. It is not an optional requirement.

We cannot waste any more time in getting these programs in effect.

### 6. *Sales Representatives*

Please ensure that you hire the very best people to be our sales representatives. We cannot progress with less than the best. We can attract the best. Let's get them.

If you plan an aggressive build-up of sales forces, plan carefully and realistically for recruitment and training. Do not expand with second-rate people or untrained people.

### 7. *Sales Functions*

Effective this date, sales representatives should have three primary functions:

1. Soliciting new sales;



2. Handling customer relations activities; and
3. Handling business retention assignments.

Ed will develop new job descriptions for your use. In these he will outline required call levels.

#### 8. *Sales Territories*

Please have all of your District Managers evaluate their territories and have new territories identified as recommended by Jerry Lynam in his recent memoranda on the subject.

### PEOPLE

The more I consider the report, the more convinced I become that the lost business problem, as with all of our problems, is essentially a problem of people not performing as well as they should or people not having the information, support, and resources they need to perform their tasks.

We have many good people. Therefore, we have the resources to accomplish what we need to accomplish. We, however, need better people. We need better sales people, better sales secretaries, better sales managers, and better district managers. We need people who can run the district independently and yet who can work within the corporate framework where company-wide policies and programs are needed for the health and profitability of the company. We cannot have go-it-aloners. We cannot have people who ignore corporate requirements because they do not like the requirements but who do not have any better answers. We cannot have uninformed people who do not know what is required. We also cannot have un-trained people trying to do some important tasks without adequate skills.

I believe that it is critically important that the Regional Sales Managers begin upgrading the sales force and begin upgrading the training of the sales force. I will ask Ed to do the same for the sales management. I believe that it is even more important that you begin looking at your people and getting the best and most competent people in the correct jobs. This company cannot grow and prosper without the right people.

## PLAINTIFF'S EXHIBIT 61B

BROWNING-FERRIS INDUSTRIES, INC.  
INTEROFFICE LETTER

## CONFIDENTIAL

March 20, 1980

To: Regional Vice Presidents

From: John Drury

Subject: Profit Margin, VEBINT Requirements

I'm sure that you don't need to be reminded of the profit margin and VEBINT requirements we discussed at last weeks meeting but their importance is so significant that they bear repeating for additional emphasis.

*Profit Margins*

We need to reach these minimum margins *after* regional office expenses by the fourth quarter and to maintain and try to improve on them for 1981:

Arrowhead	25.5%
East Central	21 %
Illinois	18 %
Northeast	20 %
Pacific	18 %
Southern	22 %
Southwest	26 %
Steel	22 %

The results for February show that the Arrowhead, Southern, Southwest and Steel regions made their margins. Naturally, the regions making the required mar-

gins are expected to maintain them and the ones not making them need to develop specific plans with time tables for meeting their requirements, I'm going to be asking you about your plans in the near future.

By the way, for those of you with former Chemical Services division operations, after closer examination we've changed the margin requirements from 15% to 20%. In addition, all capital is frozen for these operations. Capital will be approved only on an item by item basis.

## VEBINT

The freeze on below 26% VEBINT systems is in effect and remember that it won't be long until the 26% is raised to 30%. In fact we don't anticipate approving any capital for 1981 for any systems producing less than 26% at budget review time unless there is a definite plan which will result in a VEBINT of at least 30% by the first quarter. A VEBINT of 21% results in *zero profit* to the Company after considering interest, regional and national office overhead. It would probably be a good idea to use this illustration when discussing the VEBINT requirements with your staff and district managers so that they'll understand.

## PLAINTIFF'S EXHIBIT 103

. . . .

Q. (BY MR. HEMLEY) When was the first time you became aware of a claim made by Joseph Kelley or Kelco Disposal, Inc. that there had been anti-trust violations committed by BFI?

A. Oh, I don't remember.

Q. How recently was it?

A. I don't remember; it doesn't seem like it's been within the past several months, but I can't be sure.

Q. So, the first time that you became aware at all that this lawsuit was pending was within the last several months, as you now recall it?

A. No, I say I can't recall. I don't recall anything in the last—in the few recent months, but I will have to also admit that my recollection in terms of dates is not very good about anything.

Q. Do you even remember being told about the lawsuit?

A. Yes.

Q. Who told you?

A. I don't remember.

Q. What were you told?

A. Just that there had been alleged complaints about some anti-trust violations by Joe Kelley.

Q. What was your response to that?

A. I don't know that I had one. I expect that I thought it was ridiculous.

Q. Why did you think it was ridiculous?

A. Because that's not the way we operate.

Q. That's not the way you are supposed to operate?

A. That's not the way we operate.

Q. You're sure of that?

A. I'm positive.

Q. And you've checked that out? You conducted an investigation to determine whether or not it's the way you operated in Burlington, Vermont, in 1982 to '84?

A. I haven't investigated that particular situation and all the facts, but I do know that it's the company's policy that we do not—

Q. I know what the company's policy is; I want to know what investigation you conducted with respect to the Kelco case to reach the conclusion that it was a ridiculous claim?

A. I didn't.

Q. You just came to that conclusion as a matter of general principle?

A. Right.

. . . .

Q. Isn't there a policy somewhere, Mr. Thomas, which requires the company to investigate any claims of anti-trust violations? Are you aware of any such policy?

A. Well, I'm sure there is one. I couldn't—

Q. You're not familiar with it?

A. Well, not word for word.

Q. Well, tell me about it as you recall.

A. Well, just—I don't recall a specific policy requiring that as such. I know in the policy manual there are policies that say we will not do anything illegal, and it would just be reasonable that anything illegal reported would be investigated.

Q. Should be, shouldn't it?

A. You're correct, correct.

Q. It should be recorded thoroughly so that instead of just having a vice president shrug his shoulders and say, "That's ridiculous," there's some factual basis for making a judgment as to whether or not there's truth to the claim, correct?

A. But the fact—it ought to be investigated, but the fact as to whether everybody is informed of it is probably not necessary.

Q. That wasn't my question. It makes sense to you, as an officer of BFI, that a claim of an anti-trust viola-



tion be investigated so that there's some basis for judging whether or not it actually took place, correct?

A. Correct.

Q. Because absent that there's no way you can make up your mind one way or the other, is there?

A. You can make up your mind; but you can't know for certain.

. . . .

Q. Okay. And in order to determine whether there's any truth to the matter, you'd have to conduct a thorough investigation, correct?

A. Correct.

Q. We may have covered this earlier—forgive me, I don't want to be repetitious—but I want to make sure we covered it. I gather you're not aware of any inquiry—excuse me—any complaint ever being sent to Browning-Ferris Industries here in Houston by attorneys for Kelco Disposal alleging predatory pricing?

A. I don't recall any, no.

Q. It wasn't brought to your attention, if it was?

A. Not that I recall.

Q. And you're not aware of any investigation that was ever conducted?

A. Correct.

Q. Or the results of any such investigation?

A. Correct.

. . . .

Q. Do you have the same kind of opinion as to whether or not BFI in Vermont engaged in illegal behavior?

A. I don't believe we did.

Q. And what's that based on?

A. I don't believe the region and the people up there were involved in any kind of predatory pricing.

Q. You don't believe that Michael Guston could do such a thing?

A. I don't think Michael Guston did anything.

Q. You don't believe that Michael Guston authorized predatory pricing?

A. No, sir, I don't.

Q. You don't believe Michael Guston told the district manager to squish Joseph Kelley like a bug?

A. I'm not aware of that, sir.

Q. But you don't believe it could have happened because Michael Guston's not that kind of guy. Is that right?

A. Right.

Q. You don't believe that the district manager at the instance of the region set out specifically to drive Joseph Kelley out of business?

A. I don't know who the district manager was at that time.

Q. Robert Mobray.

A. Not that I know of.

Q. You don't believe that could have happened, though?

A. No, sir.

Q. Based on nothing other than your personal belief?

A. That's right.

Q. Which is unsupported by any independent investigation?

A. That's correct.

. . . .

## PLAINTIFF'S EXHIBIT 104

Q. All right. So, let's just make that clear. This letter which came in alleges predatory pricing, does it not, against Kelco—against Kelco Disposal, Inc. in Burlington, Vermont, correct?

A. Well, it speaks for itself. It doesn't use those words. It could be construed in that way. I think that's stretching the literal terms of it a little bit.

Q. You do; you think that when the letter says, "We believe that this action"—referring to elimination of dump fees and rental charges—"violates State and federal pricing laws," that that doesn't suggest to you as an attorney for Browning-Ferris that there is an allegation of predatory pricing?

A. It suggests to me that the writer of the letter may have had that in mind, yes.

Q. And you have no specific recollection today of ever having received the letter?

A. That's correct.

Q. But you have no doubt that you did receive it, correct?

A. Now, I have no doubt. I did yesterday. After receiving this copy of it, I have no doubt that I received it.

Q. Do you have a specific recollection of conducting an investigation?

A. No.

\* \* \* \*

# **PETITIONER'S BRIEF**



No. 88-556

Supreme Court, U.S.

FILED

JAN 25 1989

ROBERT F. GIBSON, JR.  
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., AND  
BROWNING-FERRIS INDUSTRIES, INC., PETITIONERS

v.

KELCO DISPOSAL, INC., AND JOSEPH KELLEY, RESPONDENTS

On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

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### QUESTION PRESENTED

Whether an award of \$6,000,000 in punitive damages, amounting to more than 100 times the plaintiff's actual damages from a purely economic tort, is excessive under the Eighth Amendment or otherwise.

## RULE 28.1 STATEMENT

Petitioner Browning-Ferris Industries of Vermont, Inc., states that its parent company is Browning-Ferris Industries, Inc. Petitioner Browning-Ferris Industries, Inc., states that its affiliates and subsidiaries (other than wholly-owned subsidiaries) are American Ref-fuel Company, a joint marketing effort with Air Products and Chemicals, Inc.; Browning-Ferris Industries de Caracas, C.A.; Browning-Ferris Industries de Maracaibo, C.A.; Canruf Management, Inc.; The Canruf Company (Limited Partnership); Warner Hill Development Company; Warner Hill Improvement Company; Al-Mulla Environment Systems, W.L.L.; Browning-Ferris Saudi Arabia, Ltd.; Swire BFI Waste Services Ltd.; Browning-Ferris Industries Iberica S.A.; Ingenieria Ambiental Granadina, S.A.; Cotecnica, C.A.; Empresa Nacional de Residuos Limitada; Servicios Metropolitanos, C.A.; and Minneapolis Refuse, Incorporated.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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No. 88-556

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BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., AND  
BROWNING-FERRIS INDUSTRIES, INC., PETITIONERS

**v.**

KELCO DISPOSAL, INC., AND JOSEPH KELLEY, RESPONDENTS

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**On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit**

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**BRIEF FOR THE PETITIONERS**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 845 F.2d 404. The opinion and order of the district court (Pet. App. 15a-27a) are not reported.

**JURISDICTION**

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISIONS INVOLVED**

1. The Eighth Amendment provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. The Due Process Clause of the Fifth Amendment provides:

No person shall \* \* \* be deprived of life, liberty, or property, without due process of law \* \* \*.

### STATEMENT

The fundamental issue in this case is whether the United States Constitution imposes any restraints on the amount of punitive damages that may be imposed by the judicial system to punish and deter wrongful conduct. Specifically, the question presented is whether an award of \$6,000,000 in punitive damages for an economic tort—an award that was more than 100 times plaintiffs' actual injury, that was completely out of line with any gain that defendants could have expected to derive from their conduct, and that was grossly disproportionate to both statutory penalties for such conduct and prior punitive damages awards in the jurisdiction—is legally excessive.

1. Respondents' complaint, filed in the United States District Court for the District of Vermont, alleged causes of action against petitioners for attempted monopolization under the Sherman Act (15 U.S.C. § 2) and tortious interference with business relations under Vermont law. Both claims were based on the contention that petitioners engaged in predatory pricing in the commercial and industrial "roll-off" waste collection business in the Burlington, Vermont area during the early 1980s. Petitioner Browning-Ferris Industries of Vermont, Inc., a subsidiary of petitioner Browning-Ferris Industries, Inc. (referred to collectively as "BFI"), competed with respondent Kelco Disposal, Inc. in that market. Kelco asserted that BFI sought to drive it out of business through below-cost pricing to certain customers in a six-month period in 1982-1983.

Viewed in the light most favorable to respondents, the evidence at trial showed the following. BFI operates

a nationwide commercial and industrial waste collection and disposal business. Pet. App. 2a. BFI entered the Burlington area trash collection market in 1973, when it hired respondent Joseph Kelley as its district manager and outfitted him with a front-end loader truck for hauling relatively small loads of trash. BFI provided these services in competition with a number of local companies. In 1976, BFI expanded its Burlington operations and began to offer roll-off collection services. It remained the sole provider of roll-off services in the Burlington area until 1980, when Kelley quit BFI and started his own waste disposal company, respondent Kelco. Pet. App. 2a-3a; J.A. 3.

Kelco's sales strategy was to undercut BFI's prices. C.A. App. 107, 135, 222. That strategy proved extremely successful. In fiscal year 1981, its first full year of operations, Kelco gained a market share of approximately 38%; that figure rose to 43% the following year. Pet. App. 2a-3a. In the fall of 1982, Kelley told a BFI employee that he planned to drive BFI out of business in Burlington. J.A. 30.

BFI employees responded to Kelco's success with an equally strong competitive spirit. When, during a bar-room conversation, BFI's district manager repeated Kelley's threat to a BFI regional executive, the executive responded in kind: "Put Kelley out of business. Do whatever it takes. Squish him like a bug." Pet. App. 2a-3a; J.A. 10. For six months in late 1982 and early 1983, BFI attempted to meet Kelco's competitive challenge by cutting its prices substantially to selected customers totaling approximately one-sixth of the Burlington roll-off market. J.A. 9. Soon after BFI began to offer the more competitive prices, Kelco's attorneys wrote a letter to BFI asserting that BFI's pricing strategy "violate[d] state and federal pricing laws" and threatening that "[u]nless [BFI] ceases to compete unfairly with Kelco immediately, we will initiate legal proceedings on behalf of Kelco." J.A. 89.



If the intent of BFI's new pricing effort was to drive Kelco from the market, it was singularly unsuccessful. While BFI actually improved the profitability of its Burlington operations despite low prices to some customers (C.A. App. 1222-1224), it was unable to increase its market share against Kelco. Indeed, Kelco gained revenues and increased its reported operating profit during the period that BFI offered low prices; it added new customers; and it raised the prices that it charged some of its existing customers. C.A. App. 499-501, 1256-1273.<sup>1</sup> After BFI abandoned its price cuts, Kelco's market share continued to rise. By 1985, Kelco served 56% of the market. BFI then sold its business and ceased operations in Burlington. C.A. App. 506, 794-795, 1218.

2. At the trial on liability, the district court instructed the jury that the same legal standard governed the federal antitrust and state tort claims. J.A. 69. The jury returned a verdict in favor of Kelco on both counts.

The district court then held a separate proceeding on Kelco's request for compensatory and punitive damages. Kelco introduced evidence regarding the revenues and profits it lost as a result of BFI's low prices. In his closing argument on punitive damages (see J.A. 43), Kelco's counsel repeatedly stressed the need for the jury to "send a message back to Houston [BFI headquarters]" so that in the future BFI would not disregard letters from competitors complaining about its low prices (J.A. 45, 51-52, 53). As Kelco's counsel put it, "the law permits a jury to deliver a message, *very much like a sentencing judge*, that this kind of illegal conduct will not be tolerated." J.A. 50 (emphasis added). He argued that this could not be done unless the jury imposed a large dollar award, because "that's the way the law

<sup>1</sup> The revenues for BFI and Kelco (on a fiscal-year basis) were as follows (C.A. App. 1217-1218):

	1981	1982	1983	1984	1985
BFI	\$207,679	\$215,053	\$240,385	\$266,249	\$230,060
Kelco	\$124,898	\$160,184	\$195,486	\$216,957	\$288,694

gives you the authority and power to do it" (J.A. 51). And in addressing "what \* \* \* amount of punitive damages should be given in this case" (J.A. 53), Kelco's counsel focused the jury's attention solely on BFI's size, as measured by its annual revenues (J.A. 53-54):

Now, I've done a chart here, and these numbers will speak pretty much for themselves. The company grossed \$1,300,000,000 last year. That's \$100 million every single month. That's \$25 million per week. Just since we've been here, this company has received approximately \$75 million in its treasury. It's \$625,000 per hour. \* \* \*

So how do you make an impression on a company like that? Well, I have another illustration. Let's assume that a man came to you and he grossed \$20,000. And he said—he had done what this company had done. Now, of course, BFI grosses \$1,300,000,000. If you fined that man \$1,000, that would be the equivalent of a \$65 million fine on BFI. \$500, \$32,500,000. A \$200 fine, which would certainly not be too much to a man grossing \$20,000, would result in a \$13 million award.

The district court instructed the jury that "under certain circumstances" the law "permits" it to award punitive damages "to punish the wrongdoer" and "to serve as an example or warning to others" (J.A. 81):

If you believe that the defendant's conduct revealed actual malice, outrageous conduct, or constituted a willful and wanton disregard of the plaintiff's rights, then and only then may you award the plaintiff a sum for punitive damages.

*Ibid.* As to the measure of punitive damages, the court simply told the jury that "[i]n determining the amount of punitive damages, if any, you may take account of the character of the defendants, their financial standing, and the nature of their acts" (*ibid.*).

The jury returned a verdict of \$51,146 in compensatory damages on both the state tort count and the anti-

trust count. In addition, with no evident reason for selecting the amount, the jury awarded \$6,000,000 as punitive damages for the state law tort. J.A. 2.

3. The district court refused to reduce the punitive damages award or to grant a retrial on damages. The court noted that "this appears to be the largest verdict in Vermont history," that "the award is 1,000 times plaintiff's net worth," and that "the punitive award dwarfs the compensatory one" (Pet. App. 24a). But it held that these factors were "not decisive," because "[t]he jury could have arrived at this figure as a reasonable punitive measure against a large company practicing predatory conduct towards a small one using the criteria given to it by this Court in its charge." *Ibid.*

The court of appeals affirmed (Pet. App. 1a-14a), rejecting BFI's challenge to the \$6,000,000 punitive damages award. The court stated that under Vermont law such awards were "incapable of precise determination" and were committed to the "enormous discretion" of the jury. *Id.* at 10a (citation omitted). Noting that a jury's decision as to the amount of BFI's punishment would be overturned only if "'manifestly and grossly excessive'" (*ibid.* (citation omitted)), the court refused to disturb the verdict because it "amount[ed] to less than .5% of BFI's revenues, approximately .6% of its net worth, and less than 5% of its net income, for fiscal year 1986" (*id.* at 11a). In so ruling, the court observed that the award was "not inconsistent" with punitive damages assessments upheld against large corporations in other jurisdictions (*ibid.*).

Based on the same reasoning, the court of appeals rejected BFI's claim that the punitive damages award violated the Eighth Amendment's prohibition against excessive fines. "Even if the eighth amendment does apply to this nominally civil case," the court stated, "we do not think the damages here were so disproportionate as to be cruel, unusual, or constitutionally excessive." Pet. App. 12a.

## SUMMARY OF ARGUMENT

### I.

A. The Excessive Fines Clause of the Eighth Amendment prohibits the imposition of punitive damages that are disproportionate to the defendant's misconduct. This conclusion is supported by the language, purposes, and origins of the Clause.

The word "fine" has long been understood to encompass any pecuniary penalty, including exactions recoverable by a private party in a civil proceeding. Punitive damages are self-avowedly punitive. As this Court has noted, "they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979). Because punitive damages are a penalty meted out in civil cases to further public policies normally associated with the criminal law, they clearly are a form of "fine" subject to Eighth Amendment protection.

The history of the Excessive Fines Clause confirms this view. The Clause derives from provisions of Magna Carta that were directed against excessive "amerce-ments," which were sums of money awarded by juries in private civil cases to punish and deter wrongful conduct. Magna Carta guaranteed that a person "shall not be amerced for a small offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense." W. McKechnie, *MAGNA CARTA* 284 (1914). This requirement of proportionality was carried forward in the English Bill of Rights of 1689, and later in the Eighth Amendment, as a prohibition of "excessive Fines." Punitive damages are the modern-day equivalent of the civil penalties of amercements, and excessive punitive damages awards pose the very problems of abusive and unjustified exactions that the Excessive Fines Clause was intended to prevent.

There is no merit to the suggestion that punitive damages are not "fines" because they are imposed in civil



cases as awards to private plaintiffs. The Excessive Fines Clause applies to punitive damages because they are monetary exactions imposed for penal purposes. It would be peculiar indeed if this basic constitutional protection could be evaded simply by having the monetary sanction levied by a "civil" rather than a "criminal" jury or by paying the money to a private party rather than the state treasury. In either event, the excessive penalty has been ordered—and is enforced—by the judicial processes of the state.

Nothing in *Ingraham v. Wright*, 430 U.S. 651 (1977), compels a different result. That case, which arose in a context far removed from the concerns that led to the adoption of the Eighth Amendment, did not involve the Excessive Fines Clause, did not consider the history and policies of that Clause, and did not hold that all civil proceedings are beyond the reach of the Eighth Amendment. In fact, the Court explicitly acknowledged that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments \* \* \* to justify application of the Eighth Amendment" (*id.* at 669 n.37).

B. Although the Excessive Fines Clause is the constitutional provision explicitly addressed to inordinate monetary penalties, the Due Process Clause also guards against excessive punitive damages. As this Court has long held, due process prohibits a state from taking a defendant's property by awarding monetary penalties to a private plaintiff that are "wholly disproportionate to the offense and obviously unreasonable." *St. Louis, I. M. & S. Ry. v. Williams*, 251 U.S. 63, 67 (1919).

## II.

The Excessive Fines Clause requires that a punitive monetary exaction not be disproportionate to the conduct for which it is imposed. Under the analysis in *Solem v. Helm*, 463 U.S. 277 (1983), the proportionality inquiry involves consideration of "the gravity of the offense and the harshness of the penalty" (*id.* at 290-291), the stat-

utory penalties imposed by legislatures for similar misconduct (*id.* at 291-292), and other punishments imposed in the jurisdiction (*id.* at 299-300). All of these factors demonstrate that the \$6,000,000 award in this case is grossly excessive.

A. The enormous civil penalty imposed on BFI cannot be justified as reasonably necessary to punish and deter the conduct for which BFI was found liable. The amount far exceeds Kelco's actual injury, which the jury assessed at \$51,000—less than 1% of the punitive damages award. The amount also far exceeds BFI's actual or potential gain from the misconduct. Nor did BFI's conduct involve particularly offensive behavior, such as physical violence, destruction of property, or breach of trust. This was a routine economic tort growing out of commercial competition.

B. The punitive damages award is grossly disproportionate to statutory penalties in Vermont and elsewhere. The accumulated experience and considered judgment of legislative bodies, including Congress in the Sherman Act, is that double or treble damages are generally sufficient penalties to punish and deter wrongful conduct, especially economic torts. The award here is nearly 40 times treble damages and hundreds of times larger than any criminal penalty authorized by Vermont law.

C. The punitive damages award greatly exceeds any other punitive damages verdict in Vermont. The next highest award ever upheld by the Vermont Supreme Court was less than \$400,000, and most punitive verdicts in that State have been under \$8,000.

D. It is impermissible to uphold a punitive damages award solely or substantially on the basis of a corporate defendant's size, as the court of appeals did here. To begin with, it is incorrect to assume that size-based awards are reasonably necessary to achieve appropriate levels of deterrence or punishment. But more important, as this case shows, exclusive focus on the amount of the defendant's income or net worth serves merely to encour-



age appeals to prejudice, provincialism and caprice on the part of the jury and leads to preposterous windfalls for plaintiffs.

### III.

At all events, the \$6,000,000 punitive award should be set aside on nonconstitutional grounds. While the criteria for determining whether punitive damages may be imposed and the ingredients that go into their measurement are derived from state law, federal law provides the standard for excessiveness review of a damages award returned by a federal jury. Federal law should not countenance a verdict that is so plainly disproportionate to the defendant's conduct and so obviously unsupported by any relevant factor.

### ARGUMENT

Under any objective standard, the \$6,000,000 punitive damages award in this case is grossly excessive. Remarkably, however, the award here is *not* remarkable: it has become common for punitive damages awards of millions of dollars—and in some instances tens of millions of dollars or more—to be returned by juries and upheld by courts. See, e.g., P. Huber, *LIABILITY: THE LEGAL REVOLUTION AND THE CONSEQUENCES* 127 (1988); M. Peterson, *et al.*, *PUNITIVE DAMAGES: EMPIRICAL FINDINGS* 65 (1987).

Runaway punitive damages awards are a relatively recent phenomenon. In the past, punitive damages were awarded in that small fraction of cases where the challenged conduct was egregiously offensive; today, as this case illustrates, the distinction between culpability sufficient to support liability for compensatory damages and culpability warranting a punitive award has tended to collapse.<sup>2</sup> In the past, punitive damages were awarded in

<sup>2</sup> In the early 1960s, only 0.2% of civil judgments in Cook County, Illinois, and 2% of civil judgments in San Francisco County, California, resulted in awards of punitive damages. By the early 1980s, those figures had increased to 3.9% in Cook County and 13.6% in San Francisco—increases of almost 2000% and 700%, respectively. See Peterson, at 9 and Table 2.1.

modest amounts; today, as this case illustrates, many awards are breathtakingly large. In the past, punitive awards generally bore a discernible relationship to the offensiveness of the defendant's behavior and roughly accorded with fines applicable to analogous criminal conduct; today, as this case illustrates, punitive damages often simply reflect the size of the defendant's pocketbook. See generally Huber, at 119, 127-131; American National Red Cross Am. Br. 8-27.

Empirical data demonstrate the magnitude of the change. A recent study found that in one of the two large jurisdictions examined, the average punitive award increased one hundred fold between the early 1960s and the early 1980s. In other jurisdictions, the *average* punitive award now approaches or exceeds \$1 million—an amount that was literally unheard of a generation ago. See, e.g., M. Peterson, at 14-15; U.S. Dep't of Justice, Tort Policy Working Group, *AN UPDATE ON THE LIABILITY CRISIS* 47-49 (Mar. 1987) ("DOJ REPORT"). And the upward movement has yet to reach a plateau; within the last few years juries have with some regularity returned punitive verdicts that exceed \$100 million.<sup>3</sup> The modest and proportioned role that, until recently, punitive damages awards played in our legal system explains why the Court has not yet addressed the issue presented here; there simply were few punitive awards that presented a serious excessiveness problem.

It is no mystery why the modern-day process of awarding punitive damages produces exorbitant sanctions. None of the checks that ordinarily guard against arbitrary and irrational governmental decisionmaking are present. First, for all practical purposes, juries are given no standards to follow in making their determinations. For example, under Vermont law, as the court of appeals

<sup>3</sup> See, e.g., *Kimble v. Tenneco, Inc.* (27-880-S) (Wharton Cty, Tex. Dist. Ct. Dec. 14, 1988), *Foster Natural Gas Rpt.*, No. 1702 at 1 (\$350,000,000); *Ford Motor Co. v. Durrill*, 764 S.W.2d 329 (Tex. Ct. App. 1986) (\$100,000,000); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (\$125,000,000).

candidly acknowledged, the jury is "invest[ed] \* \* \* with enormous discretion" in awarding punitive damages, because Vermont "views punitive damages awards as 'incapable of precise determination'" (Pet. App. 10a (citation omitted)). Second, juries need not explain the amounts they choose. Third, juries are under no obligation—and are given little basis—to consider the effects of their awards on future cases, on other defendants, or on the system of justice in general. Finally, all too often there has been no real check on this process through judicial oversight.

Without guidelines to cabin their discretion, and without serious judicial scrutiny to correct abuses, juries are given essentially plenary power to determine whether and in what amount to mulct a defendant in punitive damages: the only upper limit is, literally, the jury's imagination. As a result, juries are free to transfer vast amounts of money from defendants to plaintiffs on the basis of mistake, bias or caprice, or in response to the irresistible lure of a large corporation's "deep pocket." In no other context does the law countenance such an arbitrary exercise of governmental power.<sup>4</sup>

It is in light of this new and growing phenomenon of excessive penal monetary sanctions that BFI asks the Court to recognize that the Excessive Fines Clause of the Eighth Amendment has a limited but necessary role to play. Such profound exercises of governmental power

<sup>4</sup> Because these cases so often pit a sympathetic local plaintiff against a large out-of-state corporation, there can be no confidence that state legislatures will be motivated to deal effectively with this problem, as the Court has repeatedly noted in other settings. See, e.g., *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 n.2 (1940); see also R. Neely, *THE PRODUCT LIABILITY MESS* 4 (1988) ("As long as I [as a state judge] am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs I shall continue to do so. Not only is my sleep enhanced, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me."); L. Tribe, *AMERICAN CONSTITUTIONAL LAW* § 6-5 at 411 (2d ed. 1988); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 146 (1986).

should not be entirely shielded from constitutional scrutiny. And they need not be: history and policy teach that the Excessive Fines Clause imposes restraints on the degree to which a defendant may be punished for wrongful conduct by an award of punitive damages.

## I. THE FEDERAL CONSTITUTION PROHIBITS COURTS FROM IMPOSING AN EXCESSIVE AWARD OF PUNITIVE DAMAGES

### A. The Excessive Fines Clause Is Applicable To Punitive Damages.

If a Vermont jury exercising virtually limitless discretion had imposed a criminal fine of \$6,000,000 on BFI for its conduct here, there can be no doubt that the penalty would be subject to careful scrutiny under the Excessive Fines Clause of the Eighth Amendment. Because BFI's penalty took the form of a \$6,000,000 punitive damages judgment, however, respondents (Br. in Opp. 25) and the court of appeals (Pet. App. 12a) have suggested that the constitutional protection against excessive monetary sanctions is simply inapplicable.

The obvious question is: why? Why should the state be prevented by the Excessive Fines Clause from imposing an unwarranted punitive monetary sanction on a defendant in a criminal case but be left entirely free to impose the *identical* punitive monetary sanction on a defendant in a civil case, even though the latter sanction is expressly intended to serve precisely the same governmental interests as a criminal fine—retribution for the defendant's past conduct and deterrence of future misconduct? There is no rational basis for this formalistic distinction, which ignores the manifestly penal nature of punitive damages and cannot be squared with the language, history, and purposes of the Excessive Fines Clause.

#### 1. Punitive Damages Are "Fines" Under The Plain Language Of The Excessive Fines Clause.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed,



nor cruel and unusual punishments inflicted" (emphasis added). The plain meaning of the word "fine" in the Excessive Fines Clause encompasses a civil monetary penalty such as punitive damages.

Dictionaries commonly define the word to comprehend "[a] pecuniary penalty," "includ[ing] a forfeiture or penalty recoverable in a civil action" (BLACK'S LAW DICTIONARY 569 (5th ed. 1979)) or "a forfeiture or penalty paid to an injured party in a civil action." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 852 (unabridged 1971). Eighteenth century sources are to the same effect. See, e.g., J. Ash, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London 1775) (defining "fine" as "[t]o mulct, to punish by a pecuniary penalty"). And this Court's usage reflects the identical understanding, referring to punitive damages as "private fines levied by civil juries." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (emphasis added); see also *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("a punitive 'fine'"); *Rosenbloom v. Metro-media, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) ("private fines").<sup>5</sup>

Moreover, nothing in the language of the Excessive Fines Clause suggests that the prohibition against disproportionate monetary penalties is limited to proceedings denominated as "criminal." Indeed, this Court has held that the companion Bail Clause of the Eighth Amendment is not narrowly circumscribed to criminal proceedings (see page 24, *infra*); in English law "bail or its close cousin, mainprize, commonly were used in civil proceedings" (Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233, 1254 & n.126, 1255-1256 & n.129 (1987)).<sup>6</sup>

<sup>5</sup> Kelco's counsel acknowledged as much in his closing argument, which urged the jury to act "very much like a sentencing judge" and referred to punitive damages as a "fine" to "penalize" petitioners (J.A. 50, 53-54).

<sup>6</sup> See also BLACK'S LAW DICTIONARY, at 222 (civil bail: "to secure the release of a person who is under civil arrest for failing to pay a

This conclusion is reinforced by comparing the Eighth Amendment with the language of the Fifth and Sixth Amendments, which refer repeatedly to "crimes," "criminal cases," and "criminal prosecutions." This comparison is especially revealing because the First Congress debated the Excessive Fines Clause immediately after the Self-Incrimination Clause of the Fifth Amendment, which it specifically modified by adding the phrase "in any criminal case" to confine that provision to criminal proceedings (see 1 *Annals of Cong.* 781-783 (J. Gales & W. Seaton eds. 1789)). The absence of a similar change in the Excessive Fines Clause suggests that the Framers did not intend its protections to be restricted to criminal cases. See *Russello v. United States*, 464 U.S. 16, 23 (1983).

## 2. Punitive Damages Are Penal Monetary Sanctions That Are Designed To Serve The Same Purposes As Criminal Fines.

Punitive damages are self-avowedly penal: they are penalties meted out in civil proceedings to further public policies normally associated with the criminal law by punishing past misconduct and deterring future misconduct. See Pet. App. 10a. The penal purposes of punitive damages have long been recognized. For example, one of the leading English cases prior to the American Revolution explained that punitive damages serve "as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Wilkes v. Wood*, 98 Eng. Rep. 487, 498-499 (C.B. 1763). Thus, "[t]he recovery of damages, beyond compensation for the injury received, [is] by way of punishing the guilty, and as an example to deter others from offending in like manner." *Lake Shore & M. S. Ry. v. Prentice*, 147 U.S. 101, 107 (1893). See

debt"); 1 T. E. Tomlins, LAW DICTIONARY (LONDON 1809) (referring to "bail in civil cases"); S. Johnson, JOHNSON'S DICTIONARY (1792) ("[b]ail is the freeing or setting at liberty one arrested or imprisoned upon action either civil or criminal, under security taken for his appearance").



also, e.g., *Barry v. Edmunds*, 116 U.S. 50, 563 (1886); *Missouri Pac. Ry. v. Humes*, 115 U.S. 512, 521-523 (1885); *Milwaukee & St. P. Ry. v. Arms*, 91 U.S. (1 Otto) 489, 492 (1876).<sup>7</sup>

Modern decisions of this Court continue to recognize that punitive damages are penal sanctions designed to serve precisely the same purposes as criminal fines. As the Court stated in *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) (citation omitted), "[p]unitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'" By their very nature, punitive damages are "'quasi-criminal'" (*Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting)) and are "intended to punish culpable individuals" in order to "exact[] punishment." *Tull v. United States*, 107 S.Ct. 1831, 1838 & n.7 (1987).<sup>8</sup>

<sup>7</sup> At their inception, punitive damages may also have served a partially remedial purpose by compensating the injured plaintiff for intangible or dignitary harms that the law did not recognize as compensable. That rationale has long since disappeared. See McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C. L. REV. 129, 132 (1930). See also Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119-1130 (1984). Accordingly, the modern theory for punitive damages, in Vermont (see Pet. App. 10a) and elsewhere, is uniformly acknowledged to be punishment and deterrence. See, e.g., RESTATEMENT (SECOND) OF TORTS § 908(1) (1977).

<sup>8</sup> See also *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986) ("[t]he purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior"); *Smith v. Wade*, 461 U.S. at 49, 54 ("punitive damages, by their very nature, are not awarded to compensate the injured party" but instead are awarded "to punish \* \* \* and to deter \* \* \*"); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981) ("[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct"); *Bankers Life & Casualty Co. v. Crenshaw*, 108 S.Ct. 1645, 1655 (1988) (O'Connor, J., concurring) ("[p]unitive

The dual policies of punitive damages—punishment and deterrence—are, of course, fundamental purposes of the criminal law. See, e.g., *Allen v. Illinois*, 478 U.S. 364, 370 (1986); *Jones v. United States*, 463 U.S. 354, 368-369 (1983). As noted in the RESTATEMENT (SECOND) OF TORTS § 908 comment a (1977), "the purposes" of punitive damages and criminal fines "are the same." See also *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) ("[r]etribution and deterrence are not legitimate non-punitive governmental objectives").

Given their penal nature and criminal-law purposes, punitive damages unquestionably are "fines" within the meaning of the Excessive Fines Clause. As we now show, this conclusion is confirmed by the history of the Clause.

### 3. *The History Of The Excessive Fines Clause Confirms That The Clause Is Applicable To Punitive Damages.*

The history of the Excessive Fines Clause has been thoroughly canvassed in several recent articles<sup>9</sup> and is discussed in detail in a number of the *amicus curiae* briefs filed in this case. Those sources demonstrate that the Clause derives from limitations in English law on monetary penalties exacted in private civil cases to punish and deter misconduct. Punitive damages serve the same purposes of punishment and deterrence as the penalties that were subject to the English antecedents of the Excessive Fines Clause, and excessive punitive damages present precisely the evil of abusive and exorbitant monetary sanctions that the Clause was designed to prevent. History accordingly shows that punitive damages fall within the proscriptions of the Clause.

damages are awarded not to compensate for injury but, rather, 'to punish reprehensible conduct and to deter its future occurrence'").

<sup>9</sup> See Massey, 40 VAND. L. REV. at 1240-1269; Jeffries, 72 VA. L. REV. at 153-158; Note, *The Constitutionality of Punitive Damages Under The Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699, 1714-1719 (1987).

Although the Eighth Amendment "received very little debate in [the First] Congress" (*Weems v. United States*, 217 U.S. 349, 368 (1910)), it is clear that its provisions were "based directly on Art. I, § 9 of the Virginia Declaration of Rights (1776)," which "adopted verbatim the language of Article 10 of the English Bill of Rights." *Solem v. Helm*, 463 U.S. 277, 285 n.10 (1983).<sup>10</sup> See also *Ingraham v. Wright*, 430 U.S. 651, 664-665 (1977); *Carlson v. Landon*, 342 U.S. 524, 545 (1952). In turn, this chapter in the English Bill of Rights "can be traced back to the Magna Carta" (*Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)), which expressed the ancient principle that punishment should be proportionate to the wrong. See *Solem*, 463 U.S. at 284-285.

The relevant provisions of Magna Carta were designed to correct the abuses that had occurred in the use of "amercements." Developed after the Norman conquest, amercements were sums of money, sometimes quite large, that were awarded by juries in private civil cases to punish wrongful conduct and to deter similar misconduct. See W. McKechnie, *MAGNA CARTA* 285-286 (2d ed. 1914); 2 F. Pollack & F. Maitland, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 513-514 (2d ed. 1968). Thus, an amercement was "a financial penalty assessed at the discretion of the party's peers for a wide variety of illegal conduct, both civil and criminal." Massey, 40 *VAND. L. REV.* at 1251; see also Pollack & Maitland, at 511-515.

Amercements were based on the theory that "the offender[,] . . . having committed some wrong, . . . was at the mercy of the crown." Massey, 40 *VAND. L. REV.* at 1260. Accordingly, although assessed in civil proceedings, amercements were payable to the crown or

<sup>10</sup> Eight other states adopted similar provisions, and the federal government included the same protections in the Northwest Ordinance of 1787. See Granucci, "Nor Cruel and Unusual Punishment Inflicted": *The Original Meaning*, 57 *CALIF. L. REV.* 839, 840 (1969).

feudal lord (*id.* at 1252 & n.111). Because the amount of an amercement was discretionary, such penalties were subject to substantial misuse. 2 Pollack & Maitland, at 513; McKechnie, at 287; Massey, 40 *VAND. L. REV.* at 1251, 1260.

A central purpose of Magna Carta was to prevent excessive amercements. The Great Charter guaranteed that a person "shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence." Magna Carta, ch. 20, reprinted in McKechnie, at 284.<sup>11</sup> In light of the prior abuses of amercements, "very likely there was no clause in the Magna Carta more grateful to the mass of the people." F. Maitland, *PLEAS OF THE CROWN FOR THE COUNTY OF GLOUCESTER* xxxiv (1884).

The misuse of amercements declined sharply after Magna Carta, and by the 16th and 17th centuries "[t]he amercement fell into disuse" and was "replaced . . . [by the criminal fine] as a means by which to punish crimes." Massey, 40 *VAND. L. REV.* at 1264. Fines originated as a "voluntary" payment by an offender to the King to avoid imprisonment (Pollack & Maitland, at 517); they were devised as a means to circumvent the limitations on amercements in English law. Eventually, however, the distinctions between fines and amercements were eliminated (see Massey, 40 *VAND. L. REV.* at 1261) and fines became the prevailing monetary sanction.

<sup>11</sup> In addition to this requirement of proportionality, Magna Carta contained a second limitation on amercements, providing that even in cases of "grave offence" the amount must "yet sav[e] always" the person's means of livelihood to sustain himself and his family. McKechnie, at 284. See also *id.* at 287-294; Massey, 40 *VAND. L. REV.* at 1260. Thus, under Magna Carta, the wealth of the defendant could not be used to justify a large amercement disproportionate to the offence, although an otherwise proper amercement would be reduced if a defendant lacked the means to satisfy the award without undue hardship. See pages 42-47, *infra*.



In response to this development, defendants challenging large fines argued that such fines were equivalent to amercements and should not be allowed because of formal differences to escape the prohibitions of Magna Carta. See Pollack & Maitland, at 517. In 1684, in a decision with striking parallels to respondents' submission here that only criminal fines and not punitive damages are subject to the Eighth Amendment, "James II's judges \* \* \* determined that the Magna Carta afforded no protection whatsoever from fines" (Massey, 40 VAND. L. REV. at 1263).

This obvious evasion of fundamental rights did not long survive. To restore the previous protections against exorbitant financial penalties, the English Bill of Rights of 1689 incorporated Magna Carta's principle of proportionality by prohibiting—in language that would be adopted a century later in the Eighth Amendment—"excessive Fines."<sup>12</sup> This historical relationship between amercements (governed by Magna Carta) and fines (governed by the English Bill of Rights) is illustrated by the decision in the *Earl of Devon's Case*, 11 State Tr. 1354 (1689), decided three months after the adoption of the English Bill of Rights, in which the House of Lords ruled that an enormous "fine" was "excessive and exorbitant \* \* \* [and] against Magna Carta." See *Solem*, 463 U.S. at 285.<sup>13</sup> Thus, as *Solem* stated, amercements were "similar to a modern-day fine" (*id.* at 284 n.8).

<sup>12</sup> As Blackstone stated with specific reference to excessive fines, "the bill of rights was only declaratory, throughout, of the old constitutional law of the land." 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND \*372 (1769). See also Massey, 40 VAND. L. REV. at 1257 nn.132, 133.

<sup>13</sup> See also, e.g., 4 Blackstone, at \*372 ("[t]he reasonableness of fines in criminal cases has also usually been regulated by the determination of Magna Carta \* \* \* concerning amercements for misbehavior by the suitors in matters of civil right"); Pollack & Maitland, at 517 (concluding that fines imposed by the King's judges violated the requirement of Magna Carta that amercements be awarded by the jury).

Over time, amercements "as a \* \* \* financial sanction in civil litigation" (Massey, 40 VAND. L. REV. at 1264) were replaced by alternative awards, including, eventually, punitive damages. See *id.* at 1264-1266, 1271. By the mid- to late-18th century, common-law punitive damages awards had emerged to serve "as a punishment to the guilty," "to deter" future misconduct, and to express "the detestation of the jury." *Wilkes v. Wood*, 98 Eng. Rep. at 498-499. Thus, "a linkage [to amercements] is evident in the development of punitive damages," and "the function of amercements, namely to sanction those guilty of offenses not criminal but worthy of punishment, is clearly replicated in the awarding of punitive damages" (Massey, 40 VAND. L. REV. at 1267).

In sum, Magna Carta and the English Bill of Rights prohibited excessive monetary penalties in both civil and criminal proceedings. These protections were incorporated in American colonial charters and ultimately adopted in the Excessive Fines Clause of the Eighth Amendment. Punitive damages are the modern-day form of the civil penalties that, under fundamental English law, were required to be proportional to the wrong done. Given this historical record, the conclusion is inescapable that punitive damages are subject to the Excessive Fines Clause. Any other result, in a modern reprise of the ruling of James II's judges, would revive the distinction between "amercements" and "fines" put to rest by the English Bill of Rights and would evade the long-settled protections of Magna Carta.

**4. The Fact That Punitive Damages Are Awarded In Civil Actions And Paid To Private Parties Does Not Remove Them From The Scope Of The Excessive Fines Clause.**

Notwithstanding the constitutional text, the acknowledged penal nature and purpose of punitive damages, and the origins of the Excessive Fines Clause, defenders of enormous punitive damages verdicts assert that such damages are excluded from Eighth Amendment scrutiny



because they are imposed in civil actions rather than in criminal proceedings and are paid to a private party rather than to the state. These factors do not in any way alter the character of punitive damages as a "fine" within the meaning of the Eighth Amendment. As the Court observed more than a century ago, punitive damages are no less punitive simply because they are awarded in "a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852).

a. *The Excessive Fines Clause reaches penal monetary sanctions in civil cases.*

The language and history of the Excessive Fines Clause conclusively demonstrate that penal monetary sanctions in civil cases are "fines" under the Eighth Amendment. This is a complete answer to the objection that punitive damages are not fines in the constitutional sense because they are awarded in civil proceedings.

What is more, the premise that a proceeding or sanction must be denominated as "criminal" for the Excessive Fines Clause to apply is inconsistent with the decisions of this Court holding that a civil or criminal label is not determinative of the applicability of constitutional protections. See, e.g., *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971); *In re Gault*, 387 U.S. 1 (1967); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).<sup>14</sup> In terms of substance rather than form, it is beyond debate that "civil penalties \* \* \* exact[] punishment" (*Tull*, 107 S.Ct. at 1838 n.7) and that the "character" of a sanction imposed as punish-

<sup>14</sup> Because punitive damages are explicitly and indisputably punitive, it is unnecessary for the Court to apply the *Mendoza-Martinez* analysis to determine whether such a sanction is essentially "penal in character" (372 U.S. at 164) and "employed \* \* \* as a punishment" (*id.* at 165). Compare, e.g., Note, 85 MICH. L. REV. at 1719-1724; Note, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CALIF. L. REV. 1433, 1446-1447 (1987).

ment "is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States v. Chouteau*, 102 U.S. (12 Otto) 603, 611 (1881). "[T]he mode in which [penalties] shall be enforced, whether at the suit of a private party, or at the suit of the public, \* \* \* [is] merely [a] matter[] of legislative discretion." *Missouri Pac. Ry.*, 115 U.S. at 523. See also, e.g., *Staten Island R.T. Ry. v. Phoenix Indemnity Co.*, 281 U.S. 98, 107 (1930); *St. Louis, I. M. & S. Ry. v. Williams*, 251 U.S. 63, 66 (1919).

Indeed, it would surely be peculiar if a basic constitutional protection such as that against excessive fines could be evaded simply by having the punitive monetary sanction levied by a "civil" rather than a "criminal" jury. If that were so, then the jury in this case could as easily have fined BFI \$60,000,000 or even \$600,000,000, for the express purposes of punishment and deterrence, without implicating the Excessive Fines Clause. Viewed against the background of the English experience that led to Magna Carta and the English Bill of Rights, it is impossible to believe that the Framers would have wanted to enable the state to impose such disproportionate monetary penalties on its citizens by the simple expedient of labeling the penalty proceeding as "civil."

Nonetheless, several lower courts (see Pet. 23 n.14), relying on this Court's decision in *Ingraham v. Wright*, 430 U.S. 651 (1977), have held that the Excessive Fines Clause is inapplicable to punitive damages simply because they are imposed in civil cases. *Ingraham*, however, does not dictate any such result.

To begin with, *Ingraham* involved the Cruel and Unusual Punishments Clause rather than the Excessive Fines Clause, and therefore the Court had no occasion to consider the particular language, purpose, and history of the latter provision; as discussed above, these factors firmly establish that punitive damages are "fines" for purposes of the Excessive Fines Clause. In fact, *In-*

*graham* cannot be taken uncritically to hold that the Eighth Amendment in its entirety is inapplicable to civil cases, because the Court previously had applied the Bail Clause of the Eighth Amendment to civil proceedings. See *Carlson v. Landon*, 342 U.S. at 544-546; see also *United States v. Salerno*, 107 S.Ct. 2095, 2105 (1987) (recognizing that "*Carlson v. Landon* was a civil case").

Second, the context in which *Ingraham* arose bore no resemblance to the practices that gave rise to the Eighth Amendment. *Ingraham* involved the "paddling [of] recalcitrant student[s] on the buttocks with a flat wooden paddle" as a means of enforcing discipline in the schools (430 U.S. at 656). After surveying the historical evidence, the Court determined that a teacher's use of reasonable corporal punishment to correct a student in his care was viewed as "justifiable or lawful" (*id.* at 661) at the time the Cruel and Unusual Punishments Clause was adopted. The Court thus concluded that "[t]he prisoner and the schoolchild stand in wholly different circumstances" and that "[t]he schoolchild has little need for the protection of the Eighth Amendment." 430 U.S. at 669, 670. By contrast, a civil defendant forced to pay an excessive award of punitive damages imposed for purposes of punishment and deterrence stands in precisely the same circumstances as a criminal defendant forced to pay an excessive fine, and the historical evidence leaves no doubt that disproportionate civil fines were viewed as illegal under the antecedents of the Excessive Fines Clause—Magna Carta and the English Bill of Rights.

Finally, the Court in *Ingraham* specifically recognized that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments \* \* \* to justify application of the Eighth Amendment" (430 U.S. at 669 n.37). Thus, the Court observed, the Eighth Amendment is directed to "the criminal law function of government" (*id.* at 664). Those descriptions, while inapposite to the student disciplinary action in *Ingraham*, are directly applicable to

the retributive and deterrent sanction of court-imposed punitive damages.

Accordingly, *Ingraham* is clearly distinguishable from the present case. The Court there refused to "wrench[]" the Cruel and Unusual Punishments Clause "from its historical context and extend[] it to traditional disciplinary practices in the public schools." 430 U.S. at 669. That conclusion hardly suggests that the Court intended, *sub silentio*, to reject an application of the Excessive Fines Clause that is fully consistent with its historical context and that would prohibit excessive awards imposed for penal purposes after adjudicatory proceedings.<sup>15</sup>

<sup>15</sup> While some language in *Ingraham* sweeps more broadly than was necessary to the Court's analysis and holding, such passages cannot be regarded as an authoritative resolution of the applicability of the Excessive Fines Clause to punitive damages. For instance, the opinion states that "[b]ail, fines, and punishment traditionally have been associated with the criminal process" (430 U.S. at 664); however, the concepts of fines and bail, at least, are certainly not confined to the criminal context (see page 14 and note 6, *supra*). Similarly, the opinion notes that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions" (*id.* at 671 n.40); whatever the correctness of that statement with respect to the Cruel and Unusual Punishments Clause, it plainly has no application to the Eighth Amendment as a whole, since bail often involves pre-conviction release.

In addition, the opinion read the bail provision of the English Bill of Rights of 1689 as restricted to criminal proceedings, concluding that the deletion of the phrase "in criminal cases" was "without substantive significance" (430 U.S. at 665); recent scholarship has shown, however, that the change in language was "intended to make the [provision] applicable to all cases" and that "article ten [was] not \* \* \* limited to criminal cases" (Massey, 40 VAND. L. REV. at 1254, 1256). As a last example, the opinion interpreted Blackstone to limit the bail, fines, and punishments provisions in the English Bill of Rights to "criminal proceedings and judgments" (430 U.S. at 665); but while Blackstone discussed criminal cases, he by no means confined those provisions to such situations. See Massey, 40 VAND. L. REV. at 1256 n.131. See generally *Ingraham*, 430 U.S. at 685-687 & nn.2, 3 (White, J., dissent-



- b. *The Excessive Fines Clause does not exclude penal monetary sanctions awarded to a private party.*

Equally unavailing is the suggestion that punitive damages should not be considered "fines" because they are awarded to the plaintiff rather than to the state. If a legislature decided that fines imposed upon conviction of a crime would be paid to the victim, or to a private charity, that certainly would not immunize the amount of the fines from scrutiny under the Excessive Fines Clause. No different result is warranted in the case of punitive damages. As the Court explained in *Missouri Pac. Ry.*, 115 U.S. at 522-523:

The additional damages being by way of punishment, \* \* \* it is not a valid objection that the sufferer instead of the State receives them. \* \* \* [W]hat disposition shall be made of the amounts collected \* \* \* [in fines and penalties is] merely [a] matter[] of legislative discretion.

See also, e.g., *Staten Island R.T. Ry.*, 281 U.S. at 106-107; *St. Louis, I. M. & S. Ry.*, 251 U.S. at 66.

From the vantage of the purpose of the Clause—to protect against excessive punitive monetary exactions—it hardly matters whether a defendant mulcted by a judge or jury makes the compelled payment to an individual or to the public treasury. In either event, the excessive exaction has been ordered—and is enforced—by the judicial processes of the state. Moreover, whatever the identity of the payee, punitive damages are intended to further the public policies of punishment and deterrence. "[M]en are often punished for aggravated misconduct \* \* \* [through] damages \* \* \* given to the party injured." *Day*, 54 U.S. (13 How.) at 371. Thus, punitive damages may not escape the limitations imposed by the Excessive Fines Clause on the ground that they are paid to the plaintiff rather than to the

ing); *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 247 n.\* (1983) (Stevens, J., concurring).

state. See Massey, 40 VAND. L. REV. at 1269; Jeffries, 72 VA. L. REV. at 148; Note, 85 MICH. L. REV. at 1703-1704.

#### B. The Due Process Clause Prohibits Excessive Punitive Damages.

The Excessive Fines Clause is the constitutional provision that is explicitly addressed to the issue of inordinate monetary penalties. If, however, the Court concludes that punitive damages do not fall within the Clause because they are not formally criminal, we submit that the Due Process Clause is applicable to prohibit excessive punitive damages awards. See *Ingraham*, 430 U.S. at 671-672 (Cruel and Unusual Punishments Clause inapplicable to corporal punishment but Due Process Clause applies); see also *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 & n.6 (1983).

In its most elemental form, substantive due process "protect[s] \* \* \* against arbitrary action[s] of government" \* \* \* regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citation omitted); see also, e.g., *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981) (due process "expresses the requirement of 'fundamental fairness'"). As the Court has held, the protections of the Due Process Clause extend to "civil \* \* \* defendants \* \* \* [seeking] to protect their property." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). This constitutional guarantee prohibits the state from taking a defendant's property through arbitrary and disproportionate awards of punitive damages.

In numerous cases decided before the incorporation doctrine made the Eighth Amendment applicable to the states, this Court recognized that the Due Process Clause limits the amount of a civil monetary penalty that may be imposed. More than a century ago, for example, the Court applied the Due Process Clause in reviewing the constitutionality of a statutory double-damages penalty awarded to a private plaintiff. *Missouri Pac. Ry.*, 115



U.S. at 523. Similarly, in *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909), the Court again considered a due process challenge to a state civil penalty, holding that the Constitution would be violated by "fines . . . [that] are so grossly excessive as to amount to a deprivation of property without due process of law" (*id.* at 111). And in *St. Louis, I. M. & S. Ry. v. Williams*, *supra*, the Court recognized that the Due Process Clause "places a limitation upon the power of the states to prescribe [civil] penalties" that are "wholly disproportioned to the offense and obviously unreasonable" (251 U.S. at 66-67).

Under these authorities, excessive punitive damages violate the Due Process Clause. By definition, an excessive award bears no rational relationship to the expressed purposes of punitive damages and is "wholly disproportioned to the offense" (*Williams*, 251 U.S. at 67). For that reason, it is quintessentially an arbitrary taking of the defendant's property that results in a fundamentally unfair and unjustified transfer of wealth to the plaintiff. Such an irrational and adventitious imposition of monetary liability is capricious "in the same way that being struck by lightning is" (*Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring)), and thus deprives the defendant of due process.

## II. THE PUNITIVE DAMAGES AWARD IN THIS CASE IS EXCESSIVE

This Court has not squarely addressed the meaning of the Excessive Fines Clause, but there can be no serious dispute that the constitutional standard is one of proportionality—that is, a fine violates the Clause if it is disproportionate to the conduct for which it is imposed. That conception of the Excessive Fines Clause was one of the starting points for the Court's conclusion in *Solem v. Helm*, 463 U.S. at 289, that the Cruel and Unusual Punishments Clause bars disproportionate prison sentences: "It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of

death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not." The proportionality standard is also supported by history. As noted above, Magna Carta's prohibition against excessive amercements, to which the Excessive Fines Clause can be traced, expressly mandated proportionality between the amercement and the "degree" or "gravity" of the offense. See page 19, *supra*; *Solem*, 463 U.S. at 284-285.<sup>16</sup>

Of course, the question whether a fine is "proportionate" to the defendant's conduct cannot be answered in a vacuum or by a wholly subjective and standardless inquiry of the kind all too many courts currently engage in when reviewing punitive damages awards. This Court has firmly rejected such an ad hoc approach in a related area: in considering whether a criminal sentence is disproportionate to a particular offense in violation of the Cruel and Unusual Punishments Clause, the Court has inquired whether the sentence could be justified by reference to the purposes of criminal penalties—deterrence and punishment. *Enmund v. Florida*, 458 U.S. 782, 800-801 (1982); see also *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947) (a court should calculate the appropriate fine for civil contempt by looking to the purposes for which the fine is imposed).

Even more relevant for present purposes is the interpretation of the Eighth Amendment's prohibition against "excessive" bail. "[T]o determine whether the government's response is excessive," the Court has said, "we must compare that response against the interest the government seeks to protect by means of that response.

<sup>16</sup> The lower courts have generally construed the Excessive Fines Clause to require proportionality between the fine and the underlying offense. See, e.g., *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987); *State v. Trailer Service, Inc.*, 212 N.W.2d 683, 689 (Wisc. 1973); *Lapinski v. Copacino*, 38 A.2d 592 (Conn. 1944); cf. *Hindt v. State*, 421 A.2d 1325, 1333 (Del. 1980) (evaluating fine under Cruel and Unusual Punishments Clause); *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980) (excessive fines clause of Texas Constitution).

Thus, when the government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, *and no more.*" *Salerno*, 107 S.Ct. at 2105 (emphasis added). If "[b]ail is set at a figure higher than an amount *reasonably calculated to fulfill th[e] purpose*" of bail—ensuring the presence of the defendant—it is excessive within the meaning of the Eighth Amendment. *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (emphasis added).

It is well settled that "[p]unitive damages are designed both to punish the wrongdoer and to deter similar conduct." Pet. App. 10a. See pages 15-17, *supra*. As long as an award of punitive damages is "no more" than is "reasonably calculated" to serve these purposes, it will pass muster under the Eighth Amendment. If, on the other hand, the award exceeds any amount reasonably justified by consideration of these purposes, it is an excessive and arbitrary sanction that violates the Constitution.

This approach safeguards the interests that the Eighth Amendment is meant to protect without intruding unduly into the autonomy of the states in administering their tort systems. The Constitution establishes only an outer boundary; within that boundary, the states have substantial leeway to structure and limit the size of punitive damages awards to whatever extent, if any, they deem appropriate.<sup>17</sup> In this case, however, as we now show, the award far exceeds any arguably reasonable amount.

#### **A. The Punitive Damages Award Is Wholly Disproportionate To BFI's Conduct.**

This Court established the basic framework for a proportionality inquiry in *Solem*. First, the Court compared

<sup>17</sup> An apt analogy is the Sixth Amendment's Speedy Trial Clause, which imposes relatively loose constraints on delay between indictment and trial in a criminal case. See *Barker v. Wingo*, 407 U.S. 514 (1972). Many states, and the federal government as well, have by statute or rule adopted far more stringent requirements. See, e.g., Speedy Trial Act, 18 U.S.C. § 3162 *et seq.*

"the gravity of the offense and the harshness of the penalty" (463 U.S. at 291). Next, it assessed the reasonableness of that relationship by measuring it against the sentences that could be imposed for other offenses in the same jurisdiction and the sentences authorized for the same offense in other jurisdictions. *Id.* at 291-292, 298-299. These factors—modified so as to shift the focus to punitive damages rather than criminal sentences—also guide the present inquiry. To put this analysis into proper focus, we first address the degree of deference due to the jury's determination.

#### **1. A Jury's Unguided Award Of Punitive Damages Is Not Entitled To Deference Comparable To That Due Awards That Fall Within A Legislatively-Prescribed Range.**

*Solem* emphasized that "[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals" (463 U.S. at 290). The Court predicted that, because of this deference to legislatures and trial courts, "extended analysis" would "rarely" be required to conclude that a sentence was not disproportionate (*id.* at 290 n.16). The dissenters in *Solem* likewise emphasized the importance of the legislative judgment about the applicable range of penalties for an offense, but differed with the majority in their unwillingness to question a sentence, such as Helm's, that was authorized by the legislature. See *id.* at 314 (Burger, C.J., dissenting).

A legislature's decision to authorize the imposition of a particular sanction for a particular offense reflects a finding—either explicit or implicit—that there is an appropriate relationship between the sanction and the offense. In view of the legislature's superior ability to gather relevant facts, ascertain and express the values of the community, and establish a proportional system of sanctions with respect to all offenses, the legislature's



determinations of reasonableness plainly should be accorded considerable deference. *Gore v. United States*, 357 U.S. 386, 393 (1958) (the proper apportionment of punishment is "peculiarly [a] question[] of legislative policy"); see also *Solem*, 463 U.S. at 314 (Burger, C.J., dissenting); *Weems*, 217 U.S. at 378.<sup>18</sup>

"Substantial deference" is appropriate, however, only when the legislature has in fact authorized the sanction under review. The verdict in this case, by contrast, was not chosen by a jury from a legislatively-established spectrum of permissible punitive damages awards for the kind of wrong BFI was found to have committed. A punitive damages award rendered in this context represents *only* the view of a single jury, exercising unlimited and basically unguided discretion, regarding the appropriate sanction; it is not cloaked with greater authority. Accordingly, a court should more closely scrutinize the reasonableness of such an award in determining whether it passes muster under the Eighth Amendment.<sup>19</sup>

<sup>18</sup> Legislative determinations regarding the appropriate sanctions for particular conduct are not limited to the criminal sphere. The permissible ranges for civil penalties frequently are specified by statute. See *Atlas Roofing Co. v. Occupational Safety & Health Comm'n*, 518 F.2d 990, 1002 n.43 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977) (collecting statutes). A few States have done the same for punitive damages. See, e.g., Colo. Rev. Stat. § 13-21-102 (Bradford Supp. 1986); Conn. Gen. Stat. Ann. § 52-2406 (West. Supp. 1988); Va. Code Ann. § 8.01-38.1 (1988 Supp.). Federal statutes frequently specify a permissible range for punitive damages. See 12 U.S.C. § 1723a(e) (Federal National Mortgage Ass'n Charter Act); 15 U.S.C. § 1640(a) (Truth in Lending Act); 15 U.S.C. § 1691e(b) (Equal Credit Opportunity Act); 42 U.S.C. § 3612(c) (Fair Housing Act).

<sup>19</sup> This point would be almost too obvious to warrant discussion if a jury were allowed to impose a criminal fine of any amount it chose. The selection of a \$6,000,000 fine for unfair price competition, if not authorized by some focused legislative judgment, would instantly command close examination under the Eighth Amendment. The same procedure and outcome in a civil case warrants comparable judicial review.

## 2. The \$6,000,000 Award Cannot Be Justified By Its Relationship To The Conduct For Which BFI Was Found Liable.

The first *Solem* factor requires the reviewing court to assess "the gravity of the offense and the harshness of the penalty" (463 U.S. at 290-291). From the standpoint of both just retribution and deterrence, a greater wrong should be punished more severely than a lesser wrong. H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 9, 25 (1968); J. Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 179-182 (1892 ed.); 4 Blackstone, at \*17-18. This is no less true for punitive damages awards than for criminal fines.

*Solem* itself set forth a number of criteria by which the nature of an offense may be measured. See 463 U.S. at 292-294. In addition, the common law standards developed in the context of excessiveness challenges to punitive damages awards look to several considerations that are relevant in determining the gravity of particular conduct. Drawing upon these sources, three basic factors can be identified that warrant examination in assessing the defendant's conduct: the injury inflicted or threatened by the defendant's actions; the actual or potential gain to the defendant; and the character of the defendant's conduct.

Of course, no one of these factors will be determinative in every case. But the three factors together map out a range of punitive damages awards that will survive Eighth Amendment scrutiny because they are reasonably necessary to serve the purposes of deterring or punishing the defendant's conduct. The \$6,000,000 award in this case is well outside the relevant range, because it cannot be justified by reference to any of the three factors.<sup>20</sup>

<sup>20</sup> *Solem* observed that "[d]ecisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts." 463 U.S. at 294; see also *id.* at 292 ("courts traditionally have made \* \* \* judgments" regarding the relative gravity of offenses in the course of making sentencing determinations). While one can imagine cases in which drawing this line could be difficult, the gross disparity



a. *Actual or threatened harm*

A reviewing court should look first to the injury inflicted or threatened by the defendant's conduct. *Solem*, 463 U.S. at 292-293; *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987). The extent of the injury inflicted generally is reflected by the amount of compensatory damages; and common law excessiveness standards identify the amount of compensatory damages as a relevant factor in assessing the propriety of a punitive damages award. See, e.g., *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 207 (1st Cir. 1987), quoting RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) ("the award \* \* \* must bear some relation to \* \* \* 'the nature and extent of the harm to the plaintiff that the defendant causes'"); *Colonial Pipeline Co. v. Brown*, 365 S.E.2d 827, 833 (Ga.) (plurality opinion) (no rational relationship between offense and punishment where punitive damages were 100 times compensatory damages), app. dismissed, 109 S.Ct. 36 (1988); *Mutual Ins. Co. of N.Y. v. Estate of Wesson*, 517 So.2d 521, 533 (Miss. 1987) (the relationship between actual damages and punitive damages is a "strong consideration"); see generally K. Redden, PUNITIVE DAMAGES § 3.5(A) (1980 & 1987 Supp.).

Some commentators have proposed that punitive damages be considered excessive if greater than a prescribed multiple (typically three) of the amount of compensatory damages. See, e.g., Massey, 40 VAND. L. REV. at 1273-1274; Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 314-320 (1983); DOJ REPORT, at 82; ABA Special Comm'n on Punitive Damages, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 6-10 to 6-12 (1986) ("ABA REPORT"); see also *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1377-1378 (5th Cir. 1982) (en banc), quoting *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 331 (5th Cir. 1981) ("a formula of punitive damages equal to three times compensatory damages is a fairly good standard against which

between BFI's conduct and the amount of the award makes this an easy case.

to assess whether a jury abused its discretion"). While we do not ask the Court to rule that the Constitution imposes a fixed limit of this sort on the relationship between compensatory and punitive damages, commonly-accepted multiples do provide important standards of comparison for reviewing courts, especially because these multiples have their roots in legislative judgments about the range of sanctions necessary to accomplish the purposes of punishment and deterrence. See pages 31-32, *infra*.<sup>21</sup>

The \$6,000,000 punitive damages award in this case represents a multiple of 117 times actual damages. By any standard, that disparity sounds strong warning that the award is likely to be excessive.<sup>22</sup>

<sup>21</sup> Some courts have adopted the common law rule that a punitive damages award must always bear a reasonable relationship to the compensatory damages award; other courts have rejected that rule. Redden, § 3.6(C); 2 J. Ghiardi & J. Kircher, PUNITIVE DAMAGES LAW & PRACTICE § 18.06, at 18-19 to 18-22 (1985). Our approach is consistent with both lines of cases, because we contend only that the amount of compensatory damages is one important factor in assessing the gravity of the defendant's conduct. An award of punitive damages that is unrelated to the amount of compensatory damages may in some circumstances be upheld if it is sufficiently justified by the other factors.

It is no objection that there are special situations in which the amount of compensatory damages may not supply an appropriate basis for assessing the reasonableness of a punitive damages award. For example, a trebling of compensatory damages might be inadequate where only nominal compensatory damages are awarded. Conversely, where the award of compensatory damages far exceeds the defendant's potential gain from the tort, the compensatory award itself is likely to satisfy fully the deterrent and punitive purposes ordinarily served by a punitive award. See *Memphis Community School Dist. v. Stachura*, 477 U.S. at 312-13; *Smith v. Wade*, 461 U.S. at 94 (O'Connor, J., dissenting); Ellis, *Punitive Damages in Iowa Law: A Critical Assessment*, 66 IOWA L. REV. 1003, 1060 (1981); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1171, 1182 (1931). Ordinarily, however, the actual injury provides an important benchmark for measurement of an appropriate punitive award.

<sup>22</sup> The award in this case cannot be justified by reference to any potential but unrealized harm to Kelco. Even if BFI had succeeded

b. *Actual or potential gain by the defendant*

The amount that the defendant gained or reasonably could have expected to gain from its misconduct is also an appropriate point of reference. See *Busher*, 817 F.2d at 1415; *Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073, 1080-1081 (Ariz. 1987), cert. denied, 108 S.Ct. 212 (1988); Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1319 (1976); Note, *Status and Trends in State Products Liability Laws: Punitive Damages*, 14 J. LEGIS. 249, 257 n.63 (1987).

A defendant will be deterred from engaging in conduct in the future if the expected losses from punishment are greater than the expected gains. Bentham, at 179-181. Accordingly, the defendant's actual and reasonably anticipated gain are relevant in calculating the amount of punitive damages necessary to further the purpose of deterrence. Consideration must also be given to the likelihood that the conduct in question will go undetected and unpunished. The lower the chance of eventual punishment, the greater the punishment that may be justified to accomplish appropriate deterrence. W. LaFave & A. Scott, Jr., *CRIMINAL LAW* 25 (2d ed. 1986).

BFI's actual gain in this case was nothing. Kelco's claim is that BFI deliberately *lost* money by reducing its prices below cost before its failure to reestablish a dominant position led it to withdraw from the market. Moreover, even allowing for the added profits that BFI might have secured if it had been able to obtain a monopoly, BFI could not possibly have expected to reap anything close to \$6,000,000 in gains from this relatively small market, in which both companies' gross revenues totaled a mere \$519,000 in 1985.

in driving Kelco from the market, Kelco's loss would not have borne any reasonable relation to the \$6,000,000 award—which far exceeded any profits Kelco could have hoped to earn in the small Burlington market even if it acquired dominant status, and which was nearly 1000 times Kelco's total net worth in 1984 (C.A. App. 1268).

Nor is this a case in which a substantial upward adjustment is needed on the ground that BFI's conduct was difficult to detect. Predatory pricing is accomplished in large part by public conduct: the predator lowers its prices. And competitors in the same market are likely to have some idea of one another's costs. As a result, the probability that a firm engaging in predatory pricing will be detected is quite high. See R. Posner, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 226-227 (1976). Furthermore, a firm that is injured by predatory pricing has a strong incentive to sue—the Sherman Act provides for automatic treble damages and attorneys' fees. This theoretical analysis is borne out by what actually happened in this case. As soon as BFI began to charge lower prices, Kelco sent a letter asserting that those prices "violate state and federal pricing laws" and warning that "[u]nless Browning-Ferris ceases to compete unfairly with Kelco," legal proceedings would be commenced (J.A. 89). Kelco can hardly now claim that the conduct was difficult to detect.

One further point bears mention in this connection. An excessive punitive damages award can often defeat the purposes of rational punishment policy by deterring socially *useful* conduct. Here, for example, the excessiveness of the \$6,000,000 award over any amount that could reasonably be deemed necessary to deter BFI from engaging in predatory pricing presents a serious risk of chilling the legitimate pro-competitive conduct that the Sherman Act was intended to foster. A businessman considering cutting prices for pro-competitive reasons would think twice if the result might be ruinous punitive damages liability. See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 121-122 n.17 (1986); *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-442 (1978).

c. *Character of the defendant's conduct*

Finally, a reviewing court should consider the relative seriousness of the conduct in which the defendant has engaged. See *Rowlett*, 832 F.2d at 207 (quoting RESTATEMENT (SECOND) OF TORTS § 908(2)) (the award



"must bear some relation to the 'character of the defendant's act'"). There are several commonly accepted yardsticks against which the nature of the defendant's conduct may be measured. As the Court observed in *Solem*, "nonviolent crimes are less serious than crimes marked by violence or the threat of violence" (463 U.S. at 292-293). In addition, harm or threatened harm to persons is more serious than harm to property. *Id.* at 292, 296-297; *Busher*, 817 F.2d at 1415; *Colonial Pipeline*, 365 S.E.2d at 833; *Mutual Life Ins. Co. of N.Y.*, 517 So.2d at 533. The degree of the defendant's culpability—whether it acted intentionally and whether it took advantage of a position of trust or other special relationship to the victim—is a third relevant factor in assessing the nature of the conduct. *Solem*, 463 U.S. at 293.<sup>23</sup> A larger punitive damages award could thus be justified in cases of particularly egregious misconduct such as violent criminal behavior or acts involving a wanton disregard for the public safety or an especially grave breach of trust.

These criteria provide no basis for an upward adjustment in the range of appropriate awards indicated by the other factors in this case. The court of appeals did not suggest—and on this record could not have found—that BFI's effort to drive Kelco from the market, a commercial tort causing little harm, was done in a manner so egregious as to justify the exorbitant verdict. No threats or intimidation were directed against Kelco's employees or customers, and no property was destroyed;

<sup>23</sup> This consideration is likely to have limited relevance in the present context, because punitive damages are not available unless a defendant is shown to have acted wantonly or maliciously. Pet. App. 10a; see generally RESTATEMENT (SECOND) OF TORTS § 908(1); 1 Ghiardi & Kircher, at § 5.01. Thus, proof of malice simply establishes that the conduct merits a punitive damages award and does not speak to the appropriate size of the award. The record would have to show something more, such as an extraordinary level of wantonness or deception of persons to whom the defendant owed a duty of trust, in order to justify an especially large verdict on this ground.

BFI simply lowered its prices. This was, in short, a relatively mild form of the tort. Granting that the jury could have found that BFI's actions warranted some punishment, the misconduct was wholly insufficient to justify the huge \$6,000,000 award.<sup>24</sup>

### 3. *The Award Is Grossly Disproportionate To Statutory Penalties In Vermont And Other Jurisdictions.*

The foregoing conclusion is reinforced by the tremendous disparity between the \$6,000,000 award and legislative determinations in Vermont and elsewhere regarding appropriate penalty levels for this type of conduct. *Solem* teaches that a reviewing court should compare the sanction under review to the penalties imposed for the same and other offenses within the jurisdiction and the penalties for the same offense in other jurisdictions. 463 U.S. at 291, 298-300; see also *Weems*, 217 U.S. at 380-381. The legislature's judgment in setting such fines—which like punitive damages are designed to further the goals of deterrence and punishment—provides a powerful objective standard for a court assessing the reasonableness of a punitive damages award.

<sup>24</sup> Kelco may rely on the "tough talk" by BFI employees to the effect that they hoped to drive Kelco out of business (Pet. App. 7a, 8a). The lower courts found this evidence sufficient to establish that BFI had a specific intent to monopolize, thus proving one of the elements of the tort. Pet. App. 5a; Resp. C.A. Br. 10. But it does not show a level of wantonness beyond the bare minimum required to permit the imposition of liability and punitive damages. Indeed, Kelco's "tough talk" evidence is barely sufficient to establish anti-competitive intent, because a desire to beat the competition, even when stated in very strong terms, is as consistent with lawful competition as it is with anticompetitive conduct. Such evidence accordingly cannot be relied upon as showing an especially aggravated degree of malice. See, e.g., *Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379-380 (7th Cir. 1986), cert. denied, 480 U.S. 934 (1987); *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 887 (5th Cir. 1984); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983); P. Areeda & H. Hovorkamp, ANTITRUST LAW ¶ 714.2c (1988 Supp.).



While nonviolent tortious interference with business relations does not even appear to be a crime in Vermont, no Vermont civil or criminal penalty for *any* offense comes anywhere close to the \$6,000,000 award in the present case.<sup>25</sup> These penalties are orders of magnitude lower, generally ranging between \$1,000 to \$10,000.

Moreover, the award is equally excessive when viewed against the statutory penalties for similar misconduct in other jurisdictions. The accumulated experience and considered judgment of legislative bodies is that double or treble damages are generally sufficient penalties to punish wrongful conduct, particularly in the case of economic torts.<sup>26</sup> In the area of anti-competitive business practices, the very conduct for which BFI was found liable, Congress has provided treble damages under the Sherman Act (15 U.S.C. § 15) in large part to "penaliz[e] wrongdoers and deter[] wrongdoing." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977). State antitrust laws generally authorize treble or double damages. See U.S. Chamber of Commerce Am. Br. App. D (listing state law provisions). Even the criminal sanction under the Sherman Act, which in practice would never be applied to conduct like BFI's (see *60 Minutes with Charles F. Rule, Assistant Attorney General, Anti-trust Division*, 57 ANTITRUST L.J. 257, 266 (1988)), is limited to \$1 million no matter how grave the violation. 15 U.S.C. § 2.

The \$6,000,000 punitive damages award in this case is nearly 40 times greater than treble damages and at

<sup>25</sup> Tables listing all Vermont fines appear as appendices A, B, and C to the *amicus curiae* brief filed by the United States Chamber of Commerce, *et al.*

<sup>26</sup> See, e.g., Bank Holding Company Act, 12 U.S.C. § 1975 (treble damages); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (treble damages); 35 U.S.C. § 284 (treble damages under the federal patent laws); False Claims Act, 31 U.S.C. § 3729(a) (treble damages, except double damages where a defendant cooperates with the government's investigation); Fair Labor Standards Act, 29 U.S.C. § 216(b) (double damages).

least six times the maximum criminal fine. It therefore is vastly disproportionate to these generally recognized societal norms.

#### 4. *The Award Greatly Exceeds Other Punitive Damages Awards Imposed Pursuant To Vermont Law.*

Another relevant consideration is how the sanction under review compares to other punitive damages awards assessed pursuant to Vermont law. See *Solem*, 463 U.S. at 291, 298-300. These prior jury determinations are not as probative as legislatively-adopted sanctions, but, when considered as a group, they may provide strong evidence that an award transgresses community standards regarding appropriate levels of punishment.

The \$6,000,000 award here is wildly disproportionate to other penalties imposed in Vermont. The highest reported punitive damages award given by the Vermont courts is \$380,000 (based on compensatory damages of \$187,500). See *Coty v. Ramsey Associates, Inc.*, 546 A.2d 196, 207 (Vt.), cert. denied, 108 S.Ct. 1903 (1988). Only one other punitive award upheld by the Vermont Supreme Court has exceeded \$40,000; virtually all the others have been under \$8,000. See cases cited at Pet. 26-27 & n.17. This pattern of cases provides an objective benchmark of what juries in Vermont—even when allowed limitless discretion—consider to be appropriate levels of punishment and deterrence. The sums awarded in other cases are only a tiny fraction of the punitive award against BFI.<sup>27</sup>

<sup>27</sup> The court of appeals relied (Pet. App. 11a) on a number of punitive damages awards from other jurisdictions. But every one of those awards was less than the \$6,000,000 awarded here, most of them significantly so. In addition, they were produced by the very same kind of standardless system in which juries are invited to punish the defendant in proportion to its size rather than its conduct. Such verdicts therefore do not provide a reliable frame of reference. Moreover, looking to only a few high awards to ascertain the range of permissible punitive damages awards will lead to an inexorable upward spiral, as more and more large awards are

### B. The Award Cannot Be Upheld Solely On The Ground Of Its Relationship To BFI's Size.

We have shown that the \$6,000,000 punitive award in this case cannot be justified on the ground of its relationship to BFI's conduct. Indeed, the jury was not even asked by Kelco's counsel to measure BFI's punishment in relation to the conduct-linked factors discussed above. Rather, the jury was invited to (J.A. 53-54)—and plainly did—base the award solely on BFI's "wealth."<sup>28</sup> Similarly, the court of appeals made no serious attempt to relate the size of the award to BFI's conduct, but instead relied exclusively on its relationship to BFI's revenues, net worth, and net income. Pet. App. 11a.

Like dropping a lighted match into a can of gasoline, the widespread practice of permitting plaintiffs' counsel to urge juries to base punitive damages awards on the defendant's wealth is likely to have explosive consequences, especially when a sympathetic local plaintiff confronts a large out-of-state corporation.<sup>29</sup> As one commentator has noted, evidence of wealth "invites otherwise unguided juries to indulge any redistributive inclinations they may

justified by reference to prior large awards, and in turn validate still higher awards.

<sup>28</sup> We use the term "wealth" in this discussion as a convenient shorthand for corporate assets, revenues, and income. But it must be understood, as many courts seemingly fail to do, that the size of a corporation does not necessarily relate to its behavior in the same manner as the wealth of an individual might to his or her behavior. See page 43-44, *infra*.

<sup>29</sup> The extent of judicial acceptance of this practice is surprising, because courts and commentators have long recognized that placing evidence of a defendant's wealth before a jury is likely to be extremely prejudicial to the defendant. Thus, in *City of Newport*, this Court rested its holding that municipalities are not liable for punitive damages under 42 U.S.C. § 1983 on the ground that evidence of "the unlimited taxing power of a municipality" otherwise could be put before the jury to establish its wealth. The Court stated that such evidence "may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable [punitive damages] award. The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial." 453 U.S. at 270-271.

have." Ellis, *Fairness & Efficiency in the Law of Punitive Damages*, 56 SO. CAL. L. REV. 1, 61-62 (1982). We think it clear that this factor, more than anything else, accounts for the ever more frequent imposition of mammoth punitive damages exactions. And so long as juries are encouraged, without meaningful judicial oversight, to measure their verdicts by the defendant's assets rather than its misconduct, this phenomenon seems unlikely to abate.

In order to reverse the judgment in this case, the Court need not conclude that the wealth of the defendant may be given no role in setting the amount of a punitive award—only that any award must be linked significantly to the defendant's conduct. As we first discuss, however, there is no basis in economic logic for giving any substantial weight to the size of a corporate defendant.

1. The justification usually given for gigantic size- or wealth-based awards is that they are needed to make the punishment "smart," to "send a message to Houston" (or wherever the company headquarters may be), or otherwise to provide a meaningful incentive for the defendant to mend its ways. See, e.g., *Rowlett*, 832 F.2d at 207; RESTATEMENT (SECOND) OF TORTS § 908 comment e. But the assumptions that underlie these justifications have been accepted uncritically by their proponents and are not supported by any showing that size-based awards are in fact reasonably necessary to achieve appropriate levels of deterrence or punishment.

To begin with, the instinct that wealth is relevant to punishment has far more plausibility as applied to individuals rather than organizations and as applied to wrongs that have non-economic rather than economic motives. For example, in determining the amount of the sanction necessary to deter an individual who is inclined to commit an assault or publish a libel, it may well be appropriate to recognize that rich and poor persons are likely to place different monetary values on their misconduct. Similarly, if the question is just retribution,

the wealth of an individual may well be relevant to measuring the impact of a monetary sanction.

Large, publicly-held corporations such as BFI are clearly different from individuals in crucial respects. First, they are not "wealthy" in the same way. Rather, they consist of individual shareholders, officers, and employees, whose personal wealth is unlikely to correlate with the assets or revenues of the corporation. Second, the larger a company is, the more transactions it will engage in and the greater the frequency with which it will suffer punitive damages; accordingly, the overall level of punishment of large and small companies that commit torts at comparable rates will be the same without any size-based alteration in the punitive exactions.<sup>20</sup> Third, the economic impact of a punitive damages award falls on the innocent shareholders rather than the employees who committed the wrongful acts, making it questionable whether retribution is even a proper objective in punishing the corporation.

Deterrence, on the other hand, is plainly a proper objective of corporate punishments. As discussed above (see pages 36-37, *supra*), however, deterrence is obtained by a punitive damages award that is large enough to negate the prospect of profit from tortious conduct. Because there is no basis for supposing that a large company is less motivated by profit than a small one, both a large and a small company should be deterred equally by a punishment that removes the economic incentive for committing an economic tort.

<sup>20</sup> To illustrate this point, if a \$100 million company is subjected to ten times as many punitive damages awards as a \$10 million company but the size of each award is the same, both companies will pay the same percentage of their wealth in punitive damages. If, however, the amount of each award against the larger company is increased to reflect its size, that company will be disproportionately penalized; the larger company will be bankrupted by ten awards of \$10 million, while the smaller one will not by one award (reflecting its smaller operations) of \$1 million (reflecting its smaller size).

It is precisely this reasoning that underlay this Court's discussion of predatory pricing in cases such as *Matsushita* and *Cargill*. The Court was not willing to assume that the defendants in those cases would be more likely to engage in predatory conduct simply because they were big. Rather, it expressed skepticism about charges of predatory pricing because in most circumstances the probable gain from such conduct, even if successful, would not outweigh its costs to the predator. See *Cargill*, 479 U.S. at 121-122 n.17; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-591 (1986). The rational assumption in those cases that large defendants would act in the manner best calculated to serve their economic interests is wholly inconsistent with the notion that super-deterrent penalties are needed in the case of wealthy tortfeasors. Congress's decision to adopt a treble damages rule in the Sherman Act, rather than a standard based upon the size of the defendant, further supports this conclusion.

Finally, it is not rational to suggest that every tort justifying punitive damages, regardless of its gravity, deserves a penalty large enough to "get the attention" of the company's board of directors. Getting the attention of lower level supervisors should suffice where the magnitude of the misconduct is not great. In any event, it is wrong to suppose that a huge award is necessary to prompt concern from high-level corporate officers. The stigma associated with even a proportioned punitive award will command attention, as is evident from the lengths to which corporations will go to avoid criminal convictions even though the fine may be quite small.

In sum, a company's response to incentives is not solely, or even primarily, a function of its size. A fine that alters the defendant's gain calculus so that wrongful conduct is likely to be unprofitable will ordinarily suffice to deprive even the greediest corporate wrongdoers, however large, of incentives for misconduct. And even if it could rationally be thought that some size-



based differences exist in corporate responses to punishments, that cannot justify a regime in which the amount of punitive damages awards is, as it was here, almost wholly detached from the wrongfulness of the defendant's conduct.<sup>81</sup>

2. Although the above analysis casts considerable doubt upon the rationality of permitting any consideration of a corporate defendant's "wealth" in cases such as this one, the Court need not rule in the present case that this factor is entirely irrelevant to the excessiveness calculus. It suffices here to recognize that the relevance of wealth must be limited: the award must first and foremost bear some reasonable relationship to the defendant's conduct.

We have shown that, because punitive damages are designed to punish and deter particular conduct, the Constitution requires a connection between the amount of the award and that conduct. An award that is related to the defendant's wealth, but is substantially disconnected from the underlying conduct, plainly does not satisfy this standard. If the rule were otherwise, the Constitution would permit the imposition of a \$6,000,000 punitive damages award upon BFI for any conduct that justified the imposition of punitive damages, no matter how small the injury inflicted and no matter how minute the potential gain to BFI. Such a rule would not only be completely irrational; it would in effect punish BFI simply for the status of being large, something that is not in itself wrongful. See *United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273-

<sup>81</sup> Significantly, the draft standards for organizational sanctions circulated by the staff of the United States Sentencing Commission "reject the use of an organization's size or financial performance as a principal measure of penalties. \* \* \* [L]arge organizational size alone does not necessarily render an offense more harmful in terms of loss or detectability, and is neither prohibited nor disfavored by the law in general." *Discussion Materials on Organizational Sanctions* 8.2 (July 1988).

274 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). Cf. *Robinson v. California*, 370 U.S. 660 (1962).

Moreover, such a rule would be completely irrational and capricious. If the conduct in the present case had been engaged in by a company larger than BFI—for example Exxon, which has approximately 28 times the annual earnings and 38 times the net worth—a punitive damages award of \$168-\$228 million would have been permissible under the court of appeals' approach. The constitutional limit would turn solely on who the defendant is and not at all on the conduct for which the defendant was found liable.

Consideration of the defendant's wealth thus cannot override the basic requirement that an award be substantially related to the defendant's wrongful conduct. The \$6,000,000 award in the present case does not satisfy that minimal standard and accordingly cannot stand.

### III. THE PUNITIVE DAMAGES AWARD SHOULD IN ANY EVENT BE SET ASIDE ON NONCONSTITUTIONAL GROUNDS

Quite apart from the question whether the Constitution speaks to the size of BFI's punishment in this case, the \$6,000,000 verdict should be set aside as excessive on nonconstitutional grounds and BFI awarded either a new trial on damages or a substantial remittitur.

As we show below, the lower federal courts have recognized, essentially as a matter of federal common law, a nonconstitutional rule against excessive punitive damages in federal cases. A decision by this Court addressing the nonconstitutional excessiveness standard would further sound judicial administration in two important respects. First, it would provide valuable clarification of the legal principles governing an issue that arises with considerable frequency in the federal courts. Second, by illustrating those principles through their application to the circumstances of this case, the Court's decision would furnish significant guidance in an area that today sorely lacks a reasoned approach.

**A. Under Federal Common Law, A Punitive Damages Award Should Be Set Aside As Excessive When Its Amount Is Not Reasonably Related To The Substantive Criteria Governing The Award.**

The principle is well settled that "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is \* \* \* a matter of federal law." *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (per curiam). Accordingly, the courts of appeals have consistently held that "[f]ederal law sets the standard for granting of remittitur in a diversity case." *Catullo v. Metzner*, 834 F.2d 1075, 1082 (1st Cir. 1987); see also *American Business Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135, 1146 (8th Cir. 1986); *Matter of Innovative Construction Systems, Inc.*, 793 F.2d 875, 887 n.10 (7th Cir. 1986); *Warren v. Ford Motor Credit Co.*, 693 F.2d 1373, 1379 (11th Cir. 1982); *West v. Jutras*, 456 F.2d 1222, 1225 n.6 (2d Cir. 1972). Similarly, "the decision to set aside an excessive verdict and grant a new trial pursuant to Rule 59 is purely a matter of federal law." *Johnson v. Parrish*, 827 F.2d 988, 991 (4th Cir. 1987); see also *Galard v. Johnson*, 504 F.2d 1198, 1200 n.1 (7th Cir. 1974); 11 C. Wright & A. Miller, *FEDERAL PRACTICE AND PROCEDURE* § 2802 (1973).<sup>32</sup>

Thus, in a diversity case the availability of punitive damages and "the substantive elements upon which an award of punitive damages may be based" are gov-

<sup>32</sup> Because "[v]ariations in the excessive verdict standard are not 'bound up with the primary rights and obligations of the parties,' \* \* \* and, thus, are unlikely to promote forum shopping or to impair the equitable operation of the law," the application of a federal excessive verdict standard in diversity cases "does not implicate the concerns of the *Erie* rule." *Johnson*, 827 F.2d at 991. Rather, the issue of remittitur of (and new trials for) excessive verdicts is properly governed by federal law because it implicates the "strong federal policy against allowing state rules to disrupt the judge-jury relationship." *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 538 (1958); see *Donovan*, 429 U.S. at 649-650 (relying on *Byrd*).

erned by state law. *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1448 (10th Cir. 1987), cert. denied, 108 S.Ct. 2014 (1988). But the standard for reviewing the amount of the award—contrary to the apparent assumption of the court of appeals, which recited the Vermont standard (see Pet. App. 10a)—is a matter of federal law.

Unfortunately, the federal standard employed by many courts of appeals in reviewing claims that a jury awarded excessive punitive damages resembles the hands-off Vermont approach invoked by the court below. See, e.g., *Hughes v. Patrolmen's Benevolent Ass'n*, 850 F.2d 876, 883 (2d Cir. 1988) (citation omitted) ("an award of punitive damages is reversed only when it is 'so high as to shock the judicial conscience and constitute a denial of justice'"); *Wagenmann v. Adams*, 829 F.2d 196, 215 (1st Cir. 1987); *Hudnall v. Sellner*, 800 F.2d 377, 382 (4th Cir. 1986); *Matter of Innovative Construction Systems*, 793 F.2d at 887.

The recent explosion in the size and frequency of punitive damages demonstrates the necessity for a critical reexamination of such an unduly deferential standard. As Judge Friendly remarked more than a decade ago, "the trend toward extremely large punitive damage awards may require trial and even appellate courts to subject such awards to more exacting scrutiny than awards of compensatory damages." *Morrissey v. National Maritime Union of America*, 544 F.2d 19, 34 (2d Cir. 1976).

For the reasons already discussed, the proper federal standard is not so toothless as the "shock the conscience" or "monstrously excessive" tests often utilized in punitive damages cases. As in other areas of the law, a verdict should not stand if the reviewing court is convinced that it is irrational when viewed in light of the substantive standard and the evidence adduced at trial. Federal law should not countenance enormous verdicts that are clearly excessive. Rather, as Judge Weinfeld explained

long ago, the "shock the conscience" test is in reality "but another way of saying that before acting [to overturn a verdict] the Court must be satisfied that the result is not based upon a rational consideration of the evidence and the proper application of the law." *Reynolds v. Pegler*, 123 F. Supp. 36, 39 (S.D.N.Y. 1954), aff'd, 223 F.2d 429 (2d Cir.), cert. denied, 350 U.S. 846 (1955); see also *Westbrook v. General Tire and Rubber Co.*, 754 F.2d 1233, 1241 (5th Cir. 1985) (emphasis added) ("[a]lthough decisions have deviated from this rule, the better approach is to require a new trial on any issue infected by passion and prejudice and [to] employ remittitur for those verdicts which are excessive, that is, so large as to be contrary to right reason"); *Warren*, 693 F.2d at 1380.

**B. The \$6,000,000 Award In This Case Is Grossly Excessive.**

While Vermont law allows the wealth of the defendant to "be considered in order to determine what would be a just punishment for him" (*Lent v. Huntoon*, 470 A.2d 1162, 1170 (Vt. 1983) (quoting *Kidder v. Bacon*, 52 A. 322, 324 (Vt. 1902))), it also requires that the amount of punitive damages awarded in a particular case be fixed by reference to the conduct for which the defendant was found liable. See, e.g., *Pezzano v. Bonneau*, 329 A.2d 659, 661 (Vt. 1974); *Green v. Laclair*, 95 A. 499, 501 (Vt. 1915). For the reasons fully explained in Point II, *supra*, the jury's \$6,000,000 award in the present case cannot be defended as no more than reasonably calculated to deter and punish conduct such as that in which BFI was found to have engaged. Applying the proper federal standard of review in light of the state substantive criteria, the verdict is plainly excessive.

Federal courts have an important responsibility to superintend the rationality of punitive damages awarded by federal juries. Appropriate exercise of that responsibility requires that the award in this case be set aside.

**CONCLUSION**

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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January 19, 1988



**MOTION**



No. 88-556

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

---

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. AND  
BROWNING-FERRIS INDUSTRIES, INC.,  
*Petitioners,*

v.

KELCO DISPOSAL, INC. AND JOSEPH KELLEY,  
*Respondents.*

---

On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

---

RESPONSE TO THE MOTIONS OF THE  
GOODYEAR TIRE & RUBBER COMPANY  
AND METROMEDIA, INC.  
FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE

---

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Respondents submit this response to the motions for leave to file briefs *amici curiae* made by the Goodyear Tire & Rubber Company ("Goodyear") and Metromedia, Inc. ("Metromedia"). While we did withhold consent to these filings, as we explained to counsel, we did not do so because we are oposed in principle to participation here by these proposed *amici*.<sup>1</sup> We have given consent to the filing of approximately fourteen *amicus* briefs sup-

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<sup>1</sup> Respondent Kelco Disposal, Inc. is a Vermont corporation; pursuant to Supreme Court Rule 28.1, it has no affiliates, parent or subsidiaries.



porting petitioners.<sup>2</sup> Instead, our concern was the possibility that the filing of *amicus* briefs by Goodyear and Metromedia might possibly lead to the recusal of a member of this Court.

<sup>2</sup> These briefs involve at least the following groups:

American Corporate Counsel Association  
 American Institute of Certified Public Accountants  
 American Institute of Independent Insurance Agents  
 American Medical Association  
 American National Red Cross  
 American Newspaper Publishers Association  
 American Society of Newspaper Editors  
 American Tort Reform Association  
 Arthur Anderson & Co.  
 Arthur Young & Company  
 Associated Press  
 Association for California Tort Reform  
 Association of American Publishers  
 Atlantic Legal Foundation  
 Business Roundtable  
 Capital Cities/ABC, Inc.  
 CBS, Inc.  
 Chamber of Commerce of the United States  
 City of New York  
 Coopers & Lybrand  
 Council of Community Blood Centers  
 Defense Research Institute  
 Deloitte, Haskins & Sells  
 Dow Jones & Company, Inc.  
 Ernst & Whinney  
 General Electric Co.  
 Golden Rule Insurance Company  
 The Hearst Corporation  
 Johnson and Higgins  
 Libel Defense Resource Center  
 Maryland Hospital Association  
 Merrill, Lynch, Pierce, Fenner & Smith  
 Motor Vehicle Manufacturers of the United States, Inc.  
 National Association of Broadcasters  
 National Association of Manufacturers of the  
 United States of America  
 National Association of Mutual Insurance Companies

[Continued]

This case presents a constitutional challenge to a state-law award of punitive damages. Goodyear and Metromedia are petitioners in two other pending cases involving somewhat similar challenges to punitive damages awards.<sup>3</sup> In those cases, the petitions for writs of certiorari remain pending. In both cases, the petitioners are represented by the firm of Gibson, Dunn & Crutcher, the same firm shown as counsel in the proposed *amicus* briefs. In *Metromedia*, Justice Stevens recused himself from consideration by the full Court of a stay motion.<sup>4</sup> In addition, we have been informed by counsel for respondent in *Goodyear* that a stay motion was decided, not by Justice Blackmun, who would ordinarily receive such motions in cases arising from the Eighth Circuit, but by Justice O'Connor.

<sup>2</sup> [Continued]

National Broadcasting Company, Inc.  
 Peat, Marwick, Main & Co.  
 Pharmaceutical Manufacturers Association  
 Price Waterhouse  
 Product Liability Alliance  
 Product Liability Advisory Council, Inc.  
 Prudential, Bache  
 Risk and Insurance Managements Society, Inc.  
 Sears Roebuck & Co.  
 Shearson, Lehman & Hutton  
 Society of Professional Journalists  
 Texas Civil Justice League  
 The Time Inc. Magazine Company  
 Touche Ross & Company  
 Tribune Company  
 The Washington Post

<sup>3</sup> *Metromedia, Inc., et al. v. April Enterprises, Inc.*, No. 88-625; *The Goodyear Tire & Rubber Company v. Dale L. Hodder*, No. 88-626.

<sup>4</sup> 109 S. Ct. 212 (1988). This is consistent with his prior practice in cases involving parties represented by Gibson, Dunn & Crutcher. See, e.g., *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988).

In light of these facts, respondents denied consent to filings by Metromedia and Goodyear in order that the Court could consider the possible impact of participation by these petitioners in an *amicus* capacity in this case. We should emphasize that we do not take the view that such participation should, in fact, require any recusals.<sup>5</sup> However, we feel that this is a matter that should be considered by the Court itself. In light of the importance of this case, we have sought to forestall any possibility, however remote, that consensual filings by these proposed *amici* might later require recusals.

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<sup>5</sup> Clearly, none of the specific disqualification factors listed in 28 U.S.C. § 455(b) would apply here. Nor do we feel that *amicus* participation could lead to a situation where a Justice's "impartiality might reasonably be questioned." *Id.* § 455(a).

**RESPONDENT'S**

**BRIEF**



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 No. 88-556
 

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BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. and  
BROWNING-FERRIS INDUSTRIES, INC.,  
Petitioners,

v.

KELCO DISPOSAL, INC. and JOSEPH KELLEY,  
Respondents.

On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

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 BRIEF FOR RESPONDENTS
 

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## STATEMENT

Petitioners, Browning-Ferris Industries, Inc. ("BFI") and its Vermont subsidiary, seek a reduction in a \$6 million award of punitive damages levied against it by a Vermont jury in 1987. The district court denied petitioners' motion for remittitur, and entered judgment in accordance with the jury verdict. The Second Circuit affirmed.

This case arose out of a campaign by petitioners to drive respondent Kelco Disposal, Inc. (Kelco)<sup>1</sup> out of the roll-off waste disposal business in Burlington, Vermont. Joseph and Muriel Kelley started Kelco after Mr. Kelley

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<sup>1</sup> Respondent Kelco Disposal, Inc. is a Vermont corporation; pursuant to Supreme Court Rule 28.1, it has no affiliates, parent or subsidiaries. The judgment here on review was entered only in favor of respondent Kelco, although a second plaintiff, Joseph Kelley, has remained in the captions in the appellate phases of this case.



left BFI in 1980. C.A. App. 255-56, 436-37. They invested their life savings, sold their home, and borrowed heavily in order to finance the company. By providing better service at competitive rates, Kelco gained 40 percent of the Burlington roll-off market within one year. Pet. App. 2a. BFI's Burlington office meanwhile showed the worst performance of any BFI operation in New England. C.A. App. 1298-99.

In 1980 and again in 1982, BFI's regional management received orders from the corporate headquarters to act aggressively in any market where they were losing market share, even if it meant ignoring corporate price guidelines. J.A. 90-96. In response, the regional office directed the Burlington management to put Kelco, their only competitor, out of business. C.A. App. 141-42.<sup>2</sup> The Burlington office, in turn, contacted Kelley, asking him to furnish a list of his customers as part of an effort to buy Kelco. Kelley refused to provide the list and declined what he considered a grossly inadequate offer. C.A. App. 503-04, 508-09; J.A. 23-24. At that point, BFI's regional vice-president repeated his earlier order: "Put [Kelley] out of business. Do whatever it takes. Squish him like a bug." J.A. 10.<sup>3</sup>

BFI's Burlington office responded by cutting prices 40 percent or more on all new business for approximately

<sup>2</sup> Petitioners erroneously state that BFI ordered its Burlington office to put Kelco out of business only after Mr. Kelley made a similar threat in refusing to sell his business to BFI. Br. at 3. In fact, as BFI's own management testified, the regional office issued the order before that conversation had occurred. C.A. App. 141-42. The order was repeated when Kelley refused to sell out and given for a third time when Kelley's counsel asked BFI to stop its illegal conduct. *Id.*; C.A. App. 120-21; J.A. 6-7.

<sup>3</sup> Kelley himself had received similar orders when he worked as BFI's Burlington manager. As he testified: "[BFI's regional vice president] said cut the prices in half; he said drive them out of business. When they go out of business, double your prices. The way they did it some places out west or whatever." J.A. 25. Unlike BFI's manager in 1982, however, Kelley refused to carry out the command. *Id.*

six months and continued to set prices below its average variable costs for ten more months. App. A to Br. in Opp. to Cert. Costs, in fact, were not a concern: as BFI's salesman testified, "If it meant give the stuff away, give it away." J.A. 10. BFI's regional vice-president told Kelco's customers that "[Kelley] probably wouldn't be in business in six months anyways." J.A. 26. And each time BFI took another account, BFI's manager bragged about "hurt[ing]" Kelley. J.A. 14.<sup>4</sup>

The effects of BFI's actions were immediate and severe. During the first four months of the predatory campaign, Kelco's revenues dropped by 30 percent. C.A. App. 1235; App. B to Br. in Opp. to Cert. For the next two years, it could not repair or replace equipment; it could not pay interest on debts; and some weeks it could not meet payroll. J.A. 19-22; C.A. App. 459-61. Before the campaign was over, BFI had priced more than 1700 "hauls" illegally. J.A. 15-16; C.A. App. 342. Because of BFI's predatory conduct, by 1984 the Kelleys stood on the brink of losing a business in which they had invested their life savings and the equity from their home. C.A. App. 333.

Kelco wrote to BFI's corporate legal department shortly after the price-cutting began in 1982, warning that it was illegal and should be stopped immediately. J.A. 89. BFI did not respond, nor did it bother to investigate the charges, contrary to its own written policies. C.A. App. 1306-07, J.A. 103-04, 106. Rather, its senior management deliberately disregarded the letter, and instructed the Boston office to proceed with the predatory campaign as planned. At trial, BFI's Burlington manager was asked "[w]hat further instructions [he received] in re-

<sup>4</sup> Although BFI asserts that it "actually improved the profitability of its Burlington operations despite low prices to some customers," Br. at 4, BFI never made a profit during the predatory period and neither did Kelco. BFI's own comptroller testified that its roll-off operations were not profitable during fiscal 1983 and 1984. C.A. App. 683-84, 703; *see also id.* at 334, 338-39. Kelco also lost money in 1983 and 1984, as it did in every other year until 1985. C.A. App. 329-30, 1260-69.

sponse to that letter" and responded that "Mike Gustin [BFI's regional vice president] told me to put [Kelco] out of business." J.A. 7.

Kelco filed suit in Vermont federal district court on June 1, 1984, for attempted monopolization and tortious interference with contract. At the liability phase of the trial, Kelco presented extensive evidence of BFI's illegal conduct and malicious intent. Instructing the jury on the state-law claim, the court said that liability could be imposed only if defendants' conduct was "improper" and that the jury should employ the same analysis as in the "predatory pricing" claim under the antitrust laws. J.A. 69. The court explained that "[t]he purpose of this requirement is to allow companies to woo prospective customers away from their competitors by fair and reasonable means, but to prevent competition that is unfair and illegal." J.A. 70. The jury returned a verdict for Kelco on both the attempted monopolization and tortious interference claims, finding that BFI's conduct was illegal, intentional, and injurious. J.A. 71-72 (jury interrogatories).

With liability thus established, the district court conducted a one-day trial on damages with the same jury. With regard to punitive damages, the court told the jury that the purpose of such damages was "to punish the wrongdoer for some extraordinary conduct, outrageous misconduct, or to serve as an example or warning to others not to engage in such conduct." J.A. 81. It said that such damages could be awarded, under the standard of clear and convincing evidence, *only* if the jury "believe[d] that the defendant's conduct revealed actual malice, outrageous conduct, or constituted a willful and wanton or reckless disregard of the plaintiff's rights." Finally, the court instructed that in "determining the amount of punitive damages, if any, you may take into account the character of the defendants, their financial standing, and the nature of their acts." *Id.* BFI raised no relevant objections to the charge. The

jury awarded compensatory damages of \$51,146 and punitive damages of \$6 million. C.A. App. 1196-97.

Following the verdicts, BFI moved for judgment notwithstanding the verdict, a new trial, or remittitur. In its 59-page post-trial memorandum, BFI argued at some length that the punitive award failed to meet common-law standards. In a single sentence, without any discussion or argument, it also claimed that the award was an "excessive fine" under the Eighth Amendment; it raised no due process claim at all. The district court denied BFI's motions, concluding that the finding of liability and the award of damages were fully supported by the evidence. It specifically rejected BFI's challenge to the size of the punitive award, noting that the "jury could have arrived at this figure as a reasonable punitive measure against a large company practicing predatory conduct towards a small one using the criteria given to it by this Court in its charge." Pet. App. 24a.

The Second Circuit affirmed. It rejected BFI's arguments regarding liability, noting the "compelling evidence that defendants intended to monopolize the market and were already executing a plan to further this goal." Pet. App. 8a. Addressing the challenge to punitive damages—a challenge again primarily based on common-law standards<sup>5</sup>—the court reemphasized the "evidence that defendants willfully and deliberately attempted to drive Kelco out of the market." Pet. App. 11a. The court found no indication of jury prejudice. *Id.* Finally, it specifically rejected BFI's Eighth Amendment argument. Pointing to the modest impact of the award, the court concluded: "Even if the eighth amendment does apply to this nominally civil case, . . . we do not think the

<sup>5</sup> BFI limited its discussion of the Eighth Amendment to a single sentence and a single footnote, in which it asserted for the first time that the amendment applies because punitive damages are a form of punishment and that appropriate standards for review could be derived from *Solem v. Helm*, 463 U.S. 277 (1983). Br. of Appellants at 37 n.27. Again, it raised no due process claim.



damages were so disproportionate as to be cruel, unusual, or constitutionally excessive." Pet. App. 12a.

### SUMMARY OF ARGUMENT

The award of punitive damages in this case—determined by a jury and left undisturbed by two courts below—is both appropriate and constitutional. Although petitioners now ask this Court to overturn the award under a novel, multi-factored Eighth Amendment formula, their argument should be rejected for two independent reasons: (1) the Eighth Amendment does not apply to civil awards of punitive damages; and (2) even if it did, the award would still satisfy the applicable standards for review.

#### I.

"[T]he subject to which [the Eighth Amendment] was intended to apply [is] the criminal process." *Ingraham v. Wright*, 430 U.S. 651, 666 (1977). This conclusion is confirmed by the plain language of the Amendment and by its history. Both the immediate precursor of the Eighth Amendment—Clause 10 of the English Bill of Rights—and its distant ancestor—the Amercements Clause of the Magna Carta—were aimed at preventing abuses of *fines* imposed by and payable to the sovereign. Contemporaneous discussions of the Eighth Amendment reflect a similar concern about exercise of sovereign power.

Punitive damages, by contrast, "have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). While such damages do serve to punish and deter misconduct, they remain "wholly private penalties," *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986); they are awarded to litigants in civil disputes and set not by statute but by juries. Indeed, for several centuries, no court (in England or the United States) even suggested that punitive damages are criminal in nature or should be governed by principles of criminal law. To the contrary, following

the traditions of common law, this Court has repeatedly said that the determination of so-called "smart money" is properly the function of the jury according to "the peculiar circumstances of each case." *Day v. Woodworth*, 54 U.S. (13 How.) 389, 399 (1852).

The clear lessons of history about application of the Eighth Amendment in this context cannot be disregarded on the ground that punitive damages share some of the purposes of criminal penalties. This Court has declined to erase the distinctions between civil and criminal proceedings merely because a civil sanction might be deemed a form of "punishment." *Ingraham v. Wright*, 430 U.S. at 670 n.39. Indeed, even when the government sues for civil monetary penalties, the Court has repeatedly held that basic criminal-law protections do not apply. See, e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

There is no reason to reverse course here. Although petitioners raise the specter of open-ended awards and unbridled juries, their assertions—even if relevant to constitutional analysis—are considerably overblown. As a special committee of the American Bar Association has made clear, the present system for awarding punitive damages is generally functioning well. See *Punitive Damages: A Constructive Examination* (Report of the Special Comm. on Punitive Damages, Section of Litigation, American Bar Ass'n) (Nov. 1986). The discretion accorded to juries must be exercised within the bounds of state law, and review at both the trial and appellate levels has resulted in numerous reductions of punitive damages under standards of the common law. Moreover, the absence of Eighth Amendment scrutiny does not mean that punitive damages are immune from constitutional review. The process by which they are awarded remains subject to the Due Process Clause, see *Ingraham v. Wright*, 430 U.S. at 671-72, and, in the extraordinary case, review under principles of substantive due process may be available as well, see *Waters-*



*Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909). The judgment in this case, however, meets all such standards.

## II.

Even assuming that an award of punitive damages is subject to review under the Eighth Amendment, the damages in this case are not constitutionally excessive. The test for determining "proportionality" basically requires an assessment of "the gravity of the offense and the harshness of the penalty." See *Solem v. Helm*, 463 U.S. 277, 290-91 (1983); *Rummel v. Estelle*, 445 U.S. 263 (1980). This Court has made clear that a punishment will offend the Eighth Amendment only in "exceedingly rare cases," *id.* at 272, and that reviewing courts are not free to impose their subjective views about the appropriate sanction in a given case. Only when a prison sentence is "grossly disproportionate" does it offend the Eighth Amendment. *Solem v. Helm*, 463 U.S. at 290 n.17. See also *Rummel v. Estelle*, *supra*; *Hutto v. Davis*, 454 U.S. 370 (1982). It stands to reason that a financial penalty—deemed by the Court to be a "lesser punishment" than any imprisonment—carries an almost irrebuttable presumption of constitutionality.

Petitioners nonetheless try to argue that punitive damages must receive *more* exacting review than prison sentences, complaining that such damages are imposed by juries without legislative guidelines. But the very documents on which petitioners rely—the Magna Carta and the English and American Bills of Rights—point just the other way: they endorse the jury as a basic *protection* against abuses by the sovereign. A similar respect for the functions performed by juries has been a central feature of tort law for centuries.

The application of proper Eighth Amendment standards to the present case is a straightforward matter. First, it requires an assessment of the gravity of BFI's conduct, which amounted to a deliberate and malicious attempt to destroy its only local competitor through illegal pricing. Petitioners' effort to suggest that its con-

duct was simply good old-fashioned competition is nothing more than an impermissible attempt to retry a case that they lost. Furthermore, there is no reason to second-guess the award based on speculation that the jury did not give enough weight to certain factors now touted by BFI—*e.g.*, the amount of actual harm to Kelco, or the potential gain to BFI. Petitioners made no objection to the instructions given to the jury, and, in any event, the jury was entitled to take a more severe view of petitioners' conduct than their self-serving analysis of "harm" and "gain" would suggest.

If petitioners' conduct is seen for what it was, it follows that the penalty was not unduly harsh. The award of punitive damages amounted to no more than a few days' gross income for BFI and considerably less than 1% of its net worth. Although petitioners now argue that a jury should not give "significant weight" to BFI's sheer size in setting the penalty, they made no such objection to the relevant jury instruction. Moreover, petitioners offer no good reason for holding that the Eighth Amendment bars consideration of corporate size as part of a tort system designed to achieve effective deterrence and punishment. Indeed, the broad reliance on this criterion, from the time of Magna Carta to today, confirms precisely the opposite conclusion.

## ARGUMENT

Punitive damages have long been a bedrock component of Anglo-American tort law. Today, they are authorized by almost every state, and by the federal government in approximately twenty separate statutes.<sup>6</sup> This wide-

<sup>6</sup> See 11 U.S.C. § 303(i)(2)(B); 11 U.S.C. § 362(h); 11 U.S.C. § 363(n); 12 U.S.C. § 1723a(e); 12 U.S.C. § 3417(a)(3); 15 U.S.C. § 78u(h)(7)(A)(iii); 15 U.S.C. § 298(c); 15 U.S.C. § 1116(d)(11); 15 U.S.C. § 1681n(2); 15 U.S.C. § 1691e(b); 26 U.S.C. § 7431(c)(1)(B)(ii); 33 U.S.C. § 1514(c); 42 U.S.C. § 3612(c); 42 U.S.C. § 9607(c)(3); 45 U.S.C. § 831(j); 49 U.S.C. § 1679b(a)(1); 49 U.S.C. § 1810(a); 49 U.S.C. § 2008(a)(1); 50 U.S.C. § 1810(b). See also *Smith v. Wade*, 461 U.S. 30 (1983) (punitive damages

spread acceptance reflects the fact that punitive awards are an "efficient mode of preventing, with the least inconvenience, the commission of injuries." *Missouri Pacific Ry. v. Humes*, 115 U.S. 512, 523 (1885). As Justice Blackmun has explained, they are a part of the "full panoply of tools traditionally used by courts to do justice between parties." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 53 (1979) (concurring opinion.).

Despite the fact that punitive damages have been explicitly recognized as an appropriate remedy in tort cases since at least 1763 in England and 1791 in this country, English and American jurisprudence since that time provides no hint that they might be subject to any of the criminal-law protections afforded by our Constitution, the English Bill of Rights or Magna Carta. In recent years, however, a coalition of business interests, seeking to limit their exposure for harmful conduct, have launched a broadside attack on traditional state-law tort remedies. Unable thus far to achieve legislative reform at the national level, and dissatisfied with its pace at the state level, these interests—represented here in more than a dozen *amicus* briefs—are now seeking to place new restrictions on state tort systems by borrowing (and then expanding) protections traditionally given to criminal defendants under the Eighth Amendment.

Their proposal, taken in full, is that the Eighth Amendment should be interpreted to require constitutional review of punitive damages under standards that are far more exacting than those applicable to imprisonment for life. This notion is simply insupportable. For two centuries, it has been the province of the states to determine how to punish and deter tortious misconduct through payment of damages, subject only to the dictates of due process. Before embarking at this late date on an

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available against public officials under 42 U.S.C. § 1983). While, as petitioners note, a few of these statutes include a maximum limit, most do not. In addition, another score of federal statutes provide for treble damages.

uncharted constitutional excursion into an area traditionally left to the states, the Court should plainly demand compelling reasons to do so. Petitioners offer nothing of the kind.

**I. THE PUNITIVE DAMAGE AWARD IN THIS CASE IS NOT LIMITED BY THE EIGHTH AMENDMENT AND SATISFIES ALL RELEVANT COMMON-LAW AND CONSTITUTIONAL STANDARDS.**

**A. The Language and History of the Eighth Amendment, as well as the Historical Treatment of Punitive Damages, Demonstrate that this Constitutional Provision Plays No Role in Limiting Punitive Damage Awards.**

This Court long ago recognized that "[t]he eighth amendment is addressed to courts of the United States exercising *criminal jurisdiction*." *Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833) (emphasis supplied). This fundamental conclusion was reaffirmed only recently, after careful historical analysis. *See Ingraham v. Wright*, 430 U.S. at 666 ("the subject to which [the Eighth Amendment] was intended to apply [was] the criminal process"). Noting the plain language of the Eighth Amendment, which proscribes "excessive bail," "excessive fines," and "cruel and unusual punishments," the Court stated that "[b]ail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government."<sup>7</sup> *Id.* at 664. This analysis is fully supported by the contemporaneous understanding of the word "fine," which, in the late 18th century as now, was a criminal penalty paid to the government and was quite

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<sup>7</sup> This Court has never addressed whether the Eighth Amendment applies to corporations. *See Br. of Amicus Curiae California Trial Lawyers Ass'n* at 3-6. Because we believe the Amendment does not apply to punitive damages in any event, it appears unnecessary for the Court to reach that question in this case.



distinct from the concept of civil damages.<sup>8</sup> Petitioners' argument that history mandates a broader interpretation is wholly unpersuasive.

1. Petitioners' historical argument is based on a clear misunderstanding of the two documents that led up to the Eighth Amendment—the Magna Carta and the English Bill of Rights. First, they claim that “amercements,” which were specifically limited by the Magna Carta, were equivalent to civil punitive damages in their modern form. Second, they assert that the English Bill of Rights, and the Eighth Amendment which borrowed its language, carried forward a broad requirement of proportionality applicable to civil damages as well as criminal fines. Neither proposition can be squared with actual historical events.

To begin with, an examination of the role of amercements in the legal system of 13th-century England leads to only one conclusion: the Magna Carta, far from mandating proportionality in damages or punishments generally, sought only to limit the power of the Crown to demand excessive monetary penalties for its own benefit. During this period, there was no clear separation between civil and criminal proceedings: an action against a wrongdoer could be initiated either by the victim or through presentment by a jury. In the case of a “felony,” like murder, robbery or burglary, a finding of guilt led to a penalty of death as well as confiscation of the defendant's land and chattels. 2 F. Pollock & F. Maitland, *The History of English Law* 466, 511 (2d ed. 1909). In cases involving lesser offenses, courts could grant two

<sup>8</sup> Cunningham's English legal dictionary, published in 1771, defined “fines for offences” as “amends, pecuniary punishment, or recompence for an offence committed against the King and his laws, or against the Lord of a manor.” 2 T. Cunningham, *A New and Complete Law Dictionary* (1771) (unpaginated). See also 1 J. Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America* 411 (1839) (a “fine” is a “pecuniary punishment imposed by a lawful tribunal, upon a person convicted of crime or misdemeanor”).

types of relief. First, the wrongdoer could be required to pay a discretionary monetary penalty—either an “amercement” or a “fine”—to the King.<sup>9</sup> Second, the court could order the payment of damages to the victim.<sup>10</sup> Each of these flexible remedies had evolved from earlier, pre-Norman forms of fixed penalties payable to the King and the victim.<sup>11</sup>

During this period, amercements were imposed so frequently that “most men in England must have expected to be amerced at least once a year.” *Id.* at 513. This reflected the fact that amercements had become a routine, and often abused, form of royal revenue.<sup>12</sup> As a result, when the barons revolted at Runnymede in 1215, one of their primary concerns was the “tyrannical extortions, under the name of amercements” that had been levied during the reign of King John. T. Taswell-Langmead, *English Constitutional History* 83 (10th ed. 1946). The Magna Carta thus required, first, that a person “shall only be amerced, for a small offense after the manner of the offense, for a great crime according to the heinousness of it, saving to him his contenement; and, after the same manner, a merchant saving his merchandise, and a villein saving his wainage.” Ch. 20, *quoted in id.* at 83.

<sup>9</sup> Amercements were far more common than fines because they generally involved minor offenses and were also used in local and county courts, where the payments went to local lords or sheriffs. *Id.* at 513. They were routinely imposed on the losing parties in property disputes, on the theory that they had taken a false position before the court. See *id.* at 519. The King's courts could also assess fines, which represented the amount of a negotiated payment required by the King to forgo imprisoning the offender. *Id.* at 517.

<sup>10</sup> See *id.* at 458-59.

<sup>11</sup> *Id.* By the early 13th Century, the transition from the pre-Norman concept of a fixed “bot”—payable to each victim of a particular type of misconduct—to “damages” set on a case-by-case basis was not yet complete. *Id.* at 459, 522-26.

<sup>12</sup> See W. McKechnie, *Magna Carta* 286-87 (2d ed. 1914); T. Taswell-Langmead, *English Constitutional History* 83 (10th ed. 1946).



It went on to provide that "the amercements in all cases [were] to be assessed by the oath of honest men of the neighbourhood"—i.e., by a jury. *Id.*

Several important points emerge from this analysis. To begin with, amercements were for the commission of public wrongs and payable exclusively to the sovereign. An "amercement," in other words, "was similar to a modern day fine. It was the most common *criminal* sanction in 13th-century England." *Solem v. Helm*, 463 U.S. at 283 n.8 (emphasis supplied).<sup>13</sup> An amercement was thus different from the separate concept of damages. "The former were payable to the Crown after legal action or for an error or ineptitude which took place in its course; the latter represented the loss incurred by a litigant through an unlawful act. They were payable to [the private litigant]. . . ." 62 Selden Society, *Introduction to the Curia Regis Rolls, 1199-1230 A.D.*, at 463 (C.T. Flower ed. 1944).<sup>14</sup> Moreover, the sole concern of the Magna Carta was abuse of the amercement power by the Crown. It imposed no limitation on the power of courts to order payment of damages or, indeed, to impose other penalties up to and including death. Lastly, the fundamental procedural protection adopted in the Magna Carta to curtail this abuse was review by a jury.<sup>15</sup>

<sup>13</sup> See also 4 W. Blackstone, *Commentaries on the Laws of England* \*379 (1768) ("The reasonableness of fines in criminal cases has also usually been regulated by the determination of *magna carta* . . .") (emphasis supplied).

<sup>14</sup> As we discuss *infra*, damages during this period were not limited to compensation in the modern sense; they often included amounts that would later be termed "punitive" or "exemplary" relief. See pages 18-19 *infra*.

<sup>15</sup> Cf. *Glasser v. United States*, 315 U.S. 60, 84 (1942) ("Since it was first recognized in Magna Carta, trial by jury has been a prized shield against oppression . . .") This faith in juries was also reflected in Chapter 36 of the Magna Carta, which provided that "[t]he writ of inquest of life and limb shall be given *gratis*, and not denied." T. Taswell-Langmead, *supra*, at 85. This writ allowed a jury to investigate the *bona fides* of a charge under which an accused was detained. It allowed the accused to avoid a trial by

Curiously, it is the role of this same institution—the jury—that petitioners rail against with respect to punitive damages.<sup>16</sup>

The English Bill of Rights of 1689, much like the Magna Carta before it, was adopted to reaffirm the natural rights of Englishmen against the abuses of the Crown. This time, under the Stuarts, the King's courts had been using criminal prosecutions as a way to oppress political opponents. See *Ingraham v. Wright*, 430 U.S. at 664. They frequently set bail at exorbitant levels, forcing defendants to remain jailed for extended periods, and imposed severe punishments, including enormous fines that could either cause an offender's financial ruin or simply force him to remain incarcerated indefinitely. See *Sources of Our Liberties* 235-38 (R. Perry & J. Cooper rev. ed. 1978); L. Schwoerer, *The Declaration of Rights, 1689*, at 90-92 (1981). In response, Clause 10 of the English Bill of Rights provided that "excessive bail ought not be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." A sepa-

duel and often permitted him to be released on bail pending a decision. By discretionary denials of this writ, King John had often extorted large sums of money. See *id.* at 85-86.

<sup>16</sup> Several amici argue that the central intent of the Magna Carta was to require statutory ceilings for amercements, rather than to rely on juries to apply general principles of proportionality as they saw fit. See Br. of Amici Curiae Golden Rule Ins. Co. et al. at 10; Br. of Amicus Curiae Metromedia, Inc. at 10. This assertion, however, is based on nothing in the Magna Carta and is supported only by reference to sources describing the existence of statutes both before and after the Magna Carta limiting amercements in particular localities or for particular categories of defendants. See W. McKechnie, *supra* note 12, at 286, 298; J. Holt, *Magna Carta* 50, 230-31 (1965); F. Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300-1629*, at 361 (1948). In fact, it is clear that flexibility in the assessment of amercements was the key change in the transition from the pre-Norman system of fixed penalties to the amercement system, 2 F. Pollock & F. Maitland, *supra*, at 514, and that the Magna Carta in no sense required ceilings set by law.

rate provision again sought to preserve the jury as a bulwark against royal abuses.<sup>17</sup>

This history reaffirms what the Court has previously recognized: "the exclusive concern of [Clause 10 of the English Bill of Rights] was the conduct of *judges in enforcing the criminal law*." *Ingraham v. Wright*, 430 U.S. at 665 (emphasis supplied).<sup>18</sup> In this regard, we note that by 1689 the criminal and civil domains of English common law had become clearly separate and the term "fines" applied to the former. As Lord Coke explained, a "fine is a pecuniary punishment for an offense, or a contempt committed against the King." 1 E. Coke, *First Part of the Institutes of the Laws of England* \*126b.<sup>19</sup> The term "damages," on the other hand, was used solely in connection with awards in civil cases.<sup>20</sup> The English Bill of Rights, like the Magna Carta before

<sup>17</sup> Clause 11 provided that "jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders." This clause was inserted to prevent the Stuart practice of hand-picking jurors favorable to the Crown. *Sources of Our Liberties*, *supra*, at 238.

<sup>18</sup> As the Court further noted, while the text of Clause 10 does not actually use the term "criminal," the Preamble to the document makes the reference to criminal proceedings explicit. *Id.* at 665 & n.33.

<sup>19</sup> See also T. Blount, *A Law-Dictionary Interpreting Such Difficult and Obscure Words and Terms, as Are Found Either in Our Common or Statute, Ancient or Modern Lawes* (1670) (unpaginated) ("fine" is a "sum of Money, paid for . . . an amends, pecuniary punishment, or recompence upon an offense committed against the King, and his Laws, or a Lord of a Mannor").

<sup>20</sup> See T. Blount, *supra* note 19 ("Damage . . . Signifies generally any hurt or hindrance, that a Man receives in his Estate, but particularly, a part of that the Jurors are to enquire of, when the Action (be it real or personal) passeth for the Plaintiff. For, after Verdict given of the principal cause, they are asked their Consciences touching *Costs* . . . and *Damages*, which comprehend a recompence for what the Plaintiff or Demandant hath suffered, by means of the wrong done him by the Defendant or Tenant.")

it, says nothing about the magnitude of such civil damages.<sup>21</sup>

The concerns were much the same when the Eighth Amendment was adopted one hundred years later.<sup>22</sup> The Amendment "was based directly on Art. 1, § 9, of the Virginia Declaration of Rights (1776)," which, "in turn, had adopted verbatim the language of the English Bill of Rights." *Solem v. Helm*, 463 U.S. at 285 n.10. The Virginia Declaration itself was understood as merely incorporating the pre-existing rights of British subjects.<sup>23</sup>

<sup>21</sup> Several *amici* argue that Clause 10 of the English Bill of Rights mandated that the appropriate range of fines for particular offenses be set by statute. See Br. of *Amici Curiae* Golden Rule Ins. Co. *et al.* at 19; Br. of *Amicus Curiae* Metromedia, Inc. at 11; Br. of *Amicus Curiae* Goodyear Tire & Rubber Co. at 7. Even if true, this argument would be irrelevant since Clause 10 did not apply to civil damages. In any event, the argument is without historical basis. Long after the Bill of Rights, fines at common law continued to be set by courts without the aid of statutes, subject only to the requirement that they not be excessive. See *Standard Oil Co. v. Missouri*, 224 U.S. 270, 286 (1912); 4 W. Blackstone, *supra*, at \*378; 1 J. Bouvier, *supra* note 8, at 411. The argument of *amici* is premised entirely on a phrase lifted from a commentator's discussion of the "cruel and unusual punishments" ban in the English Bill of Rights. See L. Schwoerer, *supra*, at 93-94. In the 17th Century, as later, English law set criminal penalties, *other than fines*, by statute, 4 W. Blackstone, *supra*, at \*377-78, and the cruel and unusual punishments clause was aimed at the practice of ignoring these laws in punishing enemies of the Crown. L. Schwoerer, *supra*, at 93-94.

<sup>22</sup> See 2 J. Story, *Commentaries on the Constitution of the United States* § 1903, at 680-81 (3d ed. 1858) (Eighth Amendment was "adopted as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts").

<sup>23</sup> See *Solem v. Helm*, 463 U.S. at 285 n.10; 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 446 (J. Elliott 2d ed. 1876) (statement of Edmund Randolph) (Virginia Declaration "is nothing more than an investiture, in the hands of the Virginia citizens, of those rights which belonged to British subjects").



It is therefore unsurprising that, in the debates on ratification of the Constitution, various key Virginia figures discussing the absence of language that would later become the Eighth Amendment saw that language only as a limitation on the power of "those gentlemen who are to compose Congress, to prescribe trials and define punishments." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 447 (J. Elliott 2d ed. 1876) (statement of Patrick Henry). As Edmund Randolph put it, "we must presume corruption in the House of Representatives, Senate, and President, before we can suppose that excessive fines can be imposed or cruel punishment inflicted." *Id.* at 469. In short, the plain language of the Eighth Amendment is consistent with the intent of the Framers, whose "principal concern" was "the legislative definition of crimes and punishments." *Ingraham v. Wright*, 430 U.S. at 665.

2. Punitive damages have historical roots that are wholly unrelated to amercements or fines. They were first recognized explicitly in the eighteenth century, and were an outgrowth of the jury's exclusive power to set damages in private disputes. None of the concerns relating to governmental abuse—the concerns that led to the Amercements Clause of the Magna Carta and the Excessive Fines Clauses of the English and American Bills of Rights—has anything to do with punitive damages. Not surprisingly, therefore, history provides no indication whatever that these provisions have a role to play in limiting punitive damage awards.

The first case to refer to the concept of punitive or "exemplary damages" was *Huckle v. Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763), where the jury had awarded 300 pounds even though "the personal injury done to plaintiff was very small," so that "perhaps twenty [pounds]" would have been sufficient to compensate him. 95 Eng. Rep. at 768-69. Prior to this time, there had been no clear distinction between compensatory and punitive damages, but juries frequently made

awards that went well beyond actual injury.<sup>24</sup> Those awards were largely unreviewable.<sup>25</sup> As the power of courts to review jury awards emerged, along with modern concepts of compensation, the doctrine of punitive damages developed as a means to preserve the discretion of the jury to go beyond actual injury in cases of serious misconduct.<sup>26</sup> In *Huckle*, for example, the court observed that "the law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances." *Id.* at 768. It refused to set aside the judgment because "it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages." *Id.* at 769.<sup>27</sup>

This determined effort to preserve wide-ranging jury discretion occurred, of course, *after* the Magna Carta

<sup>24</sup> See 3 W. Blackstone, *supra*, at \*139-40 (in cases of adultery, "the damages recovered are usually very large and exemplary" and are "properly increased and diminished by circumstances; as the rank and fortune of the plaintiff and defendant"); *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927) ("The distinction between punitive and compensatory damages is a modern refinement.")

<sup>25</sup> See 3 W. Blackstone, *supra*, at \*388 (first reported case granting a new trial for an excessive award was in 1655); *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. at 116. This fact by itself serves to rebut any suggestion that the Magna Carta was understood as imposing a limitation on damages awards.

<sup>26</sup> See 1 T. Sedgwick, *A Treatise on the Measure of Damages* § 348 (8th ed. 1891) ("It can hardly be said that the decisions in [the *Huckle*] case and those which are cited as following it established a new rule of damages. They were, on the contrary, cases where the court held to old precedent in the face of hard pressure to establish a novel doctrine [limiting damages to actual injury]."); *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. at 116.

<sup>27</sup> Other courts consistently adopted a similar approach. See, e.g., *Grey v. Grant*, 2 Wils. K. B. 252, 95 Eng. Rep. 794, 795 (1764); *Benson v. Bart*, 3 Burr. 1846, 97 Eng. Rep. 1130 (1766).



and English Bill of Rights. Yet there is not a shred of evidence to suggest that any party or court ever thought that those documents were relevant to the issue. Conversely, the concept of punitive damages was well established at common law *before* the drafting of the Eighth Amendment. Yet the Framers did nothing to broaden the language of that provision beyond that used in the English Bill of Rights, and made no reference whatever to awards in private civil cases. To the contrary, they included in the Bill of Rights another provision, the Seventh Amendment, which guaranteed the right to jury trials in civil cases and protected jury findings from any greater judicial interference than was authorized at common law.<sup>28</sup>

Subsequent American legal history is equally devoid of any indication that punitive damages might implicate the Eighth Amendment. Such awards received their first reported American endorsement in 1791<sup>29</sup>—the year of the Eighth Amendment's ratification—and were recognized in *dictum* by this Court as early as 1818.<sup>30</sup> By 1852, this Court found the availability of punitive damages to be a "well-established principle of the common law" based on "repeated judicial decisions for more than a century." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852). Far from indicating concern about excessive punitive damages, the Court added that the determination of the amount of "'smart money'" to be imposed "has been always left to the discretion of the

<sup>28</sup> U.S. Const. amend. VII ("no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law").

<sup>29</sup> See *Coryell v. Colbaugh*, 1 N.J. (Coxe) 77 (1791) (in action for breach of promise to marry, jury was instructed "not to estimate the damage by any particular proof of suffering or actual loss; but to give damages for example's sake, to prevent such offenses in [the] future"); K. Redden, *Punitive Damages* § 2.3(B), at 32 (1980).

<sup>30</sup> *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818) (Story, J.) (describing "exemplary damages" as the proper response to "lawless misconduct").

jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." *Id.*

Similar sentiments were repeated throughout the rest of the nineteenth century. In *Barry v. Edmunds*, 116 U.S. 550, 565 (1886), for example, the Court not only acknowledged the wide acceptance of punitive damages but emphasized that "nothing is better settled than that, in such cases . . . it is the peculiar function of the jury to determine the amount by their verdict." It went on to quote Justice Story for the proposition that punitive awards cannot be overturned as excessive "'unless the verdict is so excessive or outrageous . . . as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them.'" *Id.*<sup>31</sup>

Early in this century, moreover, the Court indicated its understanding that punitive damages were not the same thing as criminal fines. *Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912). Rejecting a claim that a penalty imposed in a state *quo warranto* proceeding was unconstitutional because it was not based on any pre-existing rule for measuring damages and was not subject to appeal in state court, the Court drew two distinct analogies. First, it compared the new penalty to a "fine to be imposed in criminal cases," noting that at common law the "amount to be paid in all such cases was left to the discretion of the court, 'regulated by the provisions

<sup>31</sup> See also *Philadelphia, W. & B. R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 214 (1859); *Milwaukee & St. P. Ry. v. Arms*, 91 U.S. 489, 491 (1876) ("the doctrine is too well settled now to be shaken, that exemplary damages may in certain cases be assessed"); *Denver & R.G. Ry. v. Harris*, 122 U.S. 597, 609 (1887) ("The right of the jury in some cases to award exemplary or punitive damages is no longer an open question in this court."); *Lake Shore & M.S. Ry. v. Prentiss*, 147 U.S. 101, 107 (1893) ("The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized.").

of Magna Carta and the Bill of Rights that excessive fines ought not to be demanded.' " *Id.* at 285-86 (quoting 4 W. Blackstone, *supra*, at \*378). Second, it analogized the penalty to "the recovery of punitive damages," noting that at common law such damages "are not compensatory, nor is the amount measured by rule." *Id.* The Court thus not only affirmed the constitutionality of highly discretionary monetary penalties but indicated its understanding that the limitations on "fines" in the Magna Carta and English Bill of Rights applied only to criminal fines.<sup>32</sup>

In more recent years, the Court has reaffirmed the wide acceptance of punitive damages as a civil remedy in American law.<sup>33</sup> It has even made clear that such damages are available in judicially-created *Bivens*-type actions against federal officials, *Carlson v. Green*, 446 U.S. 14, 22 (1980), and in section 1983 actions against state and local officials, *Smith v. Wade*, 461 U.S. 30 (1983).

#### B. Restricting the Eighth Amendment to Criminal Sanctions is Consistent with Long-Established Differences Between Civil and Criminal Law.

The foregoing history shows, quite unmistakably, that the Eighth Amendment was intended to apply to criminal fines imposed by the government, not to private remedies in civil actions. That history should be dispositive. As the Court stated in *Ingraham v. Wright*, *supra*, "the Eighth Amendment has always turned on its original

<sup>32</sup> In Great Britain, where punitive damages are still authorized, we are aware of no suggestion up to the present day that these documents relate in any way to such damages. Thus, when Lord Devlin undertook a lengthy and highly critical analysis of punitive damages in *Rookes v. Barnard*, [1964] App. Cas. 1129, he never mentioned either the Magna Carta or the English Bill of Rights.

<sup>33</sup> See, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) ("Punitive damages have long been a part of traditional state tort law."); *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 53 (1979) (Blackmun, J., concurring); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550-51 (1943).

meaning, as demonstrated by its historical derivation." *Id.* at 670 n.39.

Although petitioners argue that it is "formalistic" to distinguish between fines imposed upon criminal convictions and damages awarded to private parties, Br. at 13, the distinction between civil and criminal remedies has been a basic feature of Anglo-American law for centuries.<sup>34</sup> The application of many provisions of law, including provisions in the Bill of Rights, turns on whether the proceeding at issue is civil or criminal. Thus, for instance, the provisions of the Sixth Amendment are applicable in criminal prosecutions, but not in disputes between private litigants. The right to jury trial in the Seventh Amendment, by contrast, may be invoked in civil cases, but not in criminal ones.

The distinction between civil and criminal matters is no less important to application of the Eighth Amendment. In *Ingraham v. Wright*, *supra*, the Court stated explicitly that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." 430 U.S. at 671 n.40; see also *DeShaney v. Winnebago County Dept. of Social Services*, 57 U.S.L.W. 4218, 4220 n.6 (February 22, 1989) (same). This link between "criminal prosecutions" and scrutiny under the Eighth Amendment does not mean, of course, that civil sanctions are free from any constitutional restraints; it simply means, as the Court in *Ingraham* went on to declare, that "[w]hen the state seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause

<sup>34</sup> See 4 W. Blackstone, *supra*, at \*5 (distinguishing "private" and "public" wrongs); *id.* at \*6 ("For instance: in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine and imprisonment; and the party beaten may also have his private remedy by action of trespass for the injury which he in particular sustains, and recover a civil satisfaction in damages.")



of the Fourteenth Amendment." 430 U.S. at 671 n.40. See *Bell v. Wolfish*, 441 U.S. 520 (1979); pages 28-29 *infra*.

The Court in *Ingraham* specifically rejected the notion that a civil sanction falls within the Eighth Amendment merely because it is intended, in some measure, as "punishment." Although it could hardly be denied that the practice there at issue (corporal punishment for students) was punitive in nature, the Court nonetheless declined to engage in "purposive analysis"—the same analysis proposed here by petitioners—remarking that "[t]here is no support whatever for this approach in the decisions of this Court." 430 U.S. at 670 n.39. The Court pointed out that "[a]lthough an imposition must be 'punishment' for the Cruel and Unusual Punishments Clause to apply, the Court has never held that *all* punishments are subject to Eighth Amendment scrutiny." *Id.* (emphasis supplied).

It is thus no help to petitioners that the Court in *Ingraham* left open the possibility that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Id.* at 669 n.37, quoted in Pet. Br. at 24. As the rest of the same footnote makes clear, the Court's concern was not with sanctions like an award of damages, but with punishments comparable to the inherently criminal sanction of imprisonment—*i.e.*, confinement in "mental or juvenile institutions." *Id.* (citing *In re Gault*, 378 U.S. 1 (1967)). Moreover, even if the concept of "analogous punishments" could somehow be stretched to reach monetary penalties, the Eighth Amendment would still have no application to remedies in private disputes, as opposed to penalties imposed by the sovereign. Private civil remedies present none of the historical concerns about abuse of govern-

mental power that led to adoption of the Eighth Amendment in the first place.<sup>35</sup>

The Court, in fact, has consistently held that constitutional protections available to criminal defendants do not apply even in cases where the government itself seeks to impose civil monetary penalties. In *United States v. Ward*, 448 U.S. 242 (1980), for example, the Court held that statutory civil penalties for water pollution—calculated on the basis of the size of the business involved, the effect on its ability to continue in operation, and the gravity of the violation—did not trigger application of the Fifth Amendment protection against self-incrimination. See also *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (civil penalty for fraud on government of double actual damages plus \$2000 for each fraudulent act does not implicate double jeopardy clause); *Hepner v. United States*, 213 U.S. 103 (1909) (no Sixth Amendment right to a jury trial in proceeding to recover fixed monetary penalty for inducing alien to enter country illegally); *United States v. Regan*, 232 U.S. 37 (1914) (proof beyond reasonable doubt not required in proceeding like that in *Hepner*, *supra*). These conclusions obtained even though the monetary penalties in question clearly served a punitive function. As the Court explained in *United States ex rel. Marcus v. Hess*, *supra*, "[b]y the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action." 317 U.S. at 550 (quoting *Day v. Woodworth*, 54 U.S. (13 How.) at 371.<sup>36</sup>

<sup>35</sup> Numerous recent decisions have rejected application of the Eighth Amendment to punitive damages. See *Electro Services, Inc. v. Exide Corp.*, 847 F.2d 1524, 1530 (11th Cir. 1988); *FDIC v. W. R. Grace & Co.*, 691 F. Supp. 87, 98 (N.D. Ill. 1988); *Underwriters Life Ins. Co. v. Cobb*, 746 S.W.2d 810, 817 (Tex. App. 1988); *Palmer v. A. H. Robins Co.*, 684 P.2d 187, 217 (Colo. 1984); *Unified School Dist. No. 490 v. Celotex Corp.*, 6 Kan. App. 2d 346, 629 P.2d 196, 206 (1981).

<sup>36</sup> See also *Hepner v. United States*, 213 U.S. at 106 (quoting *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 542 (1871)).



There is no justification for now departing from these settled principles. Punitive damages are private civil remedies, and, as we discuss next, they should be awarded and reviewed in accordance with the standards applicable to civil cases.

**C. Jury Discretion, While An Important Component of State Tort Law, Is Also Subject to Appropriate Review Under the Common Law and the Due Process Clause.**

Petitioners are ultimately left with an argument—basically one of policy—that punitive damages must be scrutinized under the Eighth Amendment because no other restraints are available. They thus contend that “juries are given essentially plenary power to determine whether and in what amount to mulct a defendant,” Br. at 12, leading to “[r]unaway punitive damages awards” that are “breathhtakingly large.” *Id.* at 10, 11. These broad statements, while eye-catching, do little to provide an accurate picture of punitive damages generally or of the process by which they are awarded.

To begin with, the sky is not falling. Although petitioners portray a system in crisis, a special committee of the American Bar Association recently found such charges to be largely baseless. After exhaustive study, including empirical research, the Committee concluded: “[T]here is no clear evidence of a present or impending crisis in punitive damages. Much of the law is established and working well.” *Punitive Damages: A Constructive Examination* (Report of the Special Comm. on Punitive Damages, Section of Litigation, American Bar Ass’n) at 1-2 (Nov. 1986). Other studies have

(“whether the liability incurred is to be regarded as a penalty, or as liquidated damages for an injury done to the United States, it is a debt, and as such it must be recoverable in a civil action”); *United States v. Regan*, 232 U.S. at 46 (“as respects a pecuniary penalty for the commission of a public offense, Congress competently may authorize . . . the enforcement of such penalty by either a criminal prosecution or civil action”).

reached similar conclusions. See Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 Colum. L. Rev. 1385, 1387 (1987) (noting “empirical evidence suggesting that any increase in the size or frequency of punitive damages has been limited to a few geographical areas”); Daniels, *Punitive Damages: The Real Story*, A.B.A. J., Aug. 1, 1986, at 60.<sup>37</sup>

Petitioners also exaggerate the latitude accorded to the jury in awarding punitive damages. Although juries are expected to exercise significant discretion, that discretion is typically guided—and cabined—by the instructions from the court. As in this case, juries are commonly instructed on the purpose of punitive damages, the type of conduct for which they can be awarded, and the factors to be considered in determining the proper sanction. J.A. 81. They are also explicitly told that they may consider only the evidence and not impermissible factors such as “bias” or “caprice.” See p. 28 *infra*; see also Pet. App. 11a (award in this case not based on “unfair prejudice”).<sup>38</sup> Following such instructions, juries often award no punitive damages at all or award only very modest amounts.

If a jury does choose to award punitive damages, there is a well-established process of judicial review. Contrary

<sup>37</sup> For analyses of the benefits of punitive damages in cases involving intentional torts, see, e.g., R. Posner, *Economic Analysis of Law* 143 (2d ed. 1977); Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F. L. Rev. 613 (1979).

<sup>38</sup> Petitioners also criticize Vermont law because it “views punitive awards as ‘incapable of precise determination.’” Br. at 12 (quoting Pet. App. 10a). The Vermont law, however, not only is standard but parallels the criminal law, where sentences are likewise incapable of precise determination. Indeed, many compensatory remedies—such as an award for pain and suffering or for the value of a broken arm—are not capable of such precision either. Significantly, petitioners themselves never suggest even a range of punitive damages that would have been appropriate in this case, let alone a precise number.

to petitioners' submission, Br. at 11-12, 49, this review is neither standardless nor toothless. Undertaken first by a trial judge who has heard the relevant evidence, and then by appellate judges familiar with the full range of verdicts within the jurisdiction, judicial review is conducted pursuant to "[a] large body of common law [that] has developed and is developing . . . whereby meaningful standards of comparison are being created." *FDIC v. W.R. Grace & Co.*, 691 F. Supp. 87, 99-100 (N.D. Ill. 1988). It is through these layers of review that the common law draws a balance between the competing goals of flexibility and consistency. The result is that reductions of punitive damages are anything but uncommon. The ABA Special Committee recently found that, in the two jurisdictions it studied, one-half of the punitive damages awards below \$50,000 were reduced through judicial review or settlement, as were 80% of those above \$50,000; indeed, "defendants paid *in toto* only 50% of the punitive damages awarded at trial." *Punitive Damages: A Constructive Examination*, *supra*, at 2-5.<sup>30</sup>

Awards of punitive damages are also subject to review under principles of due process. See *Ingraham v. Wright*, 430 U.S. at 671-72. To comport with procedural due process, a jury verdict may not be the product of bias or passion, or be reached in proceedings that lack the basic elements of fundamental fairness. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 160 (1967) (plurality opinion) ("verdict based on jury prejudice cannot be sustained even when punitive damages are warranted") (citing *Minneapolis, St. P. & S. Ste. M. Ry. v. Moquin*,

<sup>30</sup> Petitioners cite three cases involving very large punitive awards. Br. at 11 n.3. In *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. App. 1986), and *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 821-24, 174 Cal. Rptr. 348, 384-91 (1981), however, the awards were reduced from \$100 million to \$10 million and from \$125 million to \$3.5 million respectively. See also Br. of *Amicus Curiae* United States Chamber of Commerce, *et al.*, at 10 n.9 (listing cases involving significant reductions of jury awards).

283 U.S. 520, 521 (1931)).<sup>40</sup> This Court has also held, in cases decided early this century, that punitive damages may be contrary to principles of *substantive* due process if they are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable," *St. Louis, I. M. & S. Ry. v. Williams*, 251 U.S. 63, 67 (1919), or "so grossly excessive as to amount to a deprivation of property without due process of law," *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909). Although such review would necessarily be restricted to the truly extraordinary case, it provides a far more suitable means of correction than the application of a constitutional provision meant to apply in criminal cases.

"The system for punishing defendants who commit torts in a wilful and wanton manner has served us for over two hundred years . . . . No reason to date has been put forth of why a system that has been around such a long time is suddenly so fundamentally unfair . . . ." *FDIC v. W. R. Grace & Co.*, 691 F. Supp. at 100. If petitioners and others disagree with this view, they are, of course, free to follow the normal course: to press their cause in the political branches or to seek additional state-law protections from the state courts. Such efforts, as this Court explained last Term, are plainly "less intrusive" than imposing new, largely subjective constitutional restraints. *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1651 (1988). Indeed, "[s]everal states have [already] enacted limits on punitive damages in specified causes of action." *Id.* at 1651 n.3 (citations omitted). See also *Punitive Damages: A Constructive Examination*, *supra*, at 1-5 to 1-6 (listing legislative changes in standards or procedures

<sup>40</sup> In addition, two members of the Court have expressed the view that punitive damages may raise constitutional questions under the "vagueness doctrine" of the Due Process Clause. See *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1654-55 (1988) (O'Connor, J., concurring). No such due process claim has been raised in this case.



for awards of punitive damages made in fifteen states in 1986 alone). But petitioners should not be allowed unilaterally to impose their views of correct policy on the various states through a creative but incorrect analysis of the history and meaning of the Eighth Amendment.<sup>41</sup>

**D. The Award of Punitive Damages in this Case Violates Neither the Common Law nor Principles of Due Process.**

In their petition for certiorari, petitioners did not directly challenge the award in this case under principles of due process or the common law. If any such challenge is properly before the Court, however, it is manifestly without merit.

The district court and the court of appeals both found that the award was fully supportable under principles of common law. Pet. App. 11a, 24a. The usual practice of this Court is to defer to such determinations in the lower courts about the sufficiency of evidence to support a jury verdict. See *International Bhd. of Elec. Workers v. Foust*, 442 U.S. at 46 n.7.<sup>42</sup> Petitioners, however, argue that the Court should depart from this practice and, in the process, create a strict "federal common law" standard to strike down "grossly excessive," "clearly excessive" or "irrational" awards of punitive damages. Br.

<sup>41</sup> Petitioners argue that the Court should treat their policy arguments with special solicitude, asserting that, "[b]ecause [tort] cases so often pit a sympathetic local plaintiff against a large out-of-state corporation, there can be no confidence that state legislatures will be motivated to deal effectively with this problem." Br. at 12 n.4. The suggestion is belied by the fact, noted in text, that numerous states have already enacted corrective legislation. At the same time, Congress—with its national viewpoint—has declined to do so.

<sup>42</sup> In *Foust*, the Court refused to "substitute [its] judgment for that of the jury, District Court, and Court of Appeals" on the "essentially evidentiary question" of whether there was "insufficient evidence of malicious, wanton, or oppressive conduct to justify the jury's punitive damages award." 442 U.S. at 46 n.7.

at 49-50. The Court should decline this invitation for several reasons.

First of all, petitioners are offering a distinction without a difference: in the end, they propose essentially the same standard that already applies at common law. See *Pezzano v. Bonneau*, 133 Vt. 88, 329 A.2d 659, 661 (1974) ("manifestly and grossly excessive"). Second, and in any event, the federal common law does not require imposition of a more exacting standard of review. To the contrary, while it is true that "[t]he proper role of trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law," *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (*per curiam*), the primary reason for this rule is that the federal courts, unlike their state counterparts, operate "under the influence—if not the command—of the Seventh Amendment." *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958). That Amendment—which requires jury trials in civil cases and accords special deference to the jury's verdict—would hardly provide justification for a rule conferring increased judicial authority to set aside or reduce jury verdicts.<sup>43</sup>

Petitioners fare no better under the Due Process Clause. The standard of review under that clause ("wholly disproportion[ate]" or "grossly excessive") is likewise indistinguishable from that applied to punitive damages under Vermont law in general and in this case in particular. See Pet. App. 24a ("manifestly and grossly excessive"). Moreover, there is no basis for suggesting that an award of \$6 million was "grossly," "wholly," or "manifestly" excessive in a case involving a billion dollar

<sup>43</sup> See *Wratchford v. S.J. Groves & Sons Co.*, 405 F.2d 1061, 1065 (4th Cir. 1969) (Seventh Amendment may require application of restrictive federal rule on directed verdicts rather than less restrictive state rule); *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 971 (7th Cir. 1983) (standard of review on issue of setting aside jury verdict as excessive has Seventh Amendment implications).



company that attempted to destroy a tiny local competitor through unlawful means. *See also* pp. 37-49 *infra*. Indeed, that conclusion is fully supported by the cases decided by this Court pursuant to principles of substantive due process. The Court has upheld a civil penalty—also imposed for anticompetitive conduct—that was worth far more than the damage award in this case;<sup>44</sup> another substantial penalty that was set solely at the discretion of a state court without the possibility of review;<sup>45</sup> and a third penalty that was more than a hundred times larger than the actual injury caused.<sup>46</sup>

In sum, the award in this case meets all applicable standards under the Constitution and the common law. The courts below so concluded, and there is no reason to reach a different conclusion here.

**II. EVEN ASSUMING THAT THE EIGHTH AMENDMENT APPLIES TO PUNITIVE DAMAGES, THE JUDGMENT IN THIS CASE WAS NOT EXCESSIVE.**

Even assuming that the Eighth Amendment applies to punitive damages, it would not require reversal of the judgment in this case. That Amendment, as this Court has held, is not a basis for wholesale second-guessing of judges and juries; it serves, at most, to invalidate those penalties that are so “harsh”—considering the misconduct at issue and the need to punish and deter such mis-

<sup>44</sup> In *Waters-Pierce Oil Co. v. Texas*, *supra*, a state antitrust law was applied to sanction a corporation in the amount of \$1,623,500 (in 1909 dollars), as well as to bar the corporation from further operation in the state. The Court upheld these penalties based on the nature of the conduct at issue and the size of the corporation. 212 U.S. at 112.

<sup>45</sup> *See Standard Oil Co. v. Missouri*, 224 U.S. at 280 (upholding revocation of business franchise and \$50,000 penalty set by the state supreme court in *quo warranto* proceeding based on state antitrust laws).

<sup>46</sup> *See St. Louis, I. M. & S. Ry. v. Williams*, 251 U.S. at 64, 67 (upholding a penalty of \$75, plus \$25 in attorneys fees, for a railroad overcharge of \$.66 and rejecting a test based on the ratio between the injury and the penalty).

conduct—as to be “grossly disproportionate.” *Solem v. Helm*, 463 U.S. at 290 n.17; *see Rummel v. Estelle*, *supra*. Here, the jury reasonably determined that an award of approximately two days’ revenue was an appropriate sanction in light of conduct that it found to be outrageous.

**A. Jury Awards of Punitive Damages are Entitled to at Least as Much Deference Under the Eighth Amendment as Is Accorded to Criminal Sentencing Decisions.**

This Court has never had occasion to set forth the specific standards to be applied under the Excessive Fines Clause. It has indicated, however—in discussing review of criminal sentences under the Eighth Amendment—that the basic inquiry into the legitimacy of both fines and imprisonment is one of “proportionality.” *Solem v. Helm*, 463 U.S. at 284-86, 288-89.

The proper analysis under the Excessive Fines Clause, as under the Cruel and Unusual Punishments Clause, must therefore take into account the “gravity of the offense and the harshness of the penalty.” *Id.* at 290-91; *see also Rummel v. Estelle*, *supra*; *Weems v. United States*, 217 U.S. 349 (1910). That inquiry, however, cannot take place in a vacuum: whether a particular penalty is overly “harsh” in comparison with particular conduct, must turn, at least in part, on the purposes of imposing a penalty in the first place. This Court has frequently pointed out that punishment is intended both to punish past conduct and deter future offenses. *See United States v. Brown*, 381 U.S. 437, 458 (1965); *Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 851-52 (1984). Monetary fines, no less than other penalties, are directed toward those ends.

This Court has also made clear that the review of penalties must be a highly deferential one. In *Rummel v. Estelle*, *supra*, for example, the Court emphasized that “[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.” 445 U.S. at 272. With

regard to the sentence before it in that case, the Court observed that judgments regarding the need for severe penalties for recidivists "are matters largely within the discretion of the punishing jurisdiction." *Id.* at 285. Two years later, referring to its decision in *Rummel*, the Court again said that "'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare.'" *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (citations omitted).

The Court in *Solem v. Helm*, *supra*, while concluding that the Eighth Amendment prohibited a life sentence without parole for a number of "relatively minor" offenses, 463 U.S. at 297-98, continued to stress that the standard was an extremely difficult one to meet. The Court thus acknowledged that, "in view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." *Id.* at 290 n.16. It also emphasized that the basic question to be answered was whether the sentence was "grossly disproportionate." *Id.* at 290 n.17. This kind of deference is justified, even compelled, by the fact that decisions about penal sanctions involve highly subjective and controversial judgments about retribution, as well as specific and general deterrence, which are all matters best left to the democratic branches and the finders of fact in a given case.

Petitioners contend, however, that awards of punitive damages should be subject to a *higher* standard of review than sentences of imprisonment, because they are set by juries according to common law, rather than by judges according to statute. But it would be utterly anomalous to hold that the Eighth Amendment applies with greater rigor to financial penalties, which, as the Court observed in *Solem*, are plainly a "lesser punishment" than incarceration. *Id.* at 289; *see id.* at 294 n.18 (noting "clear line between sentences of imprisonment and sentences involving no deprivation of liberty"). In-

deed, several courts of appeals have indicated that the sort of proportionality analysis followed in *Solem*—one looking to various "objective factors," 463 U.S. at 290—is not necessary in a case involving a lesser term of imprisonment comparable to those in *Rummel* and *Hutto*. *See, e.g., Chandler v. Jones*, 813 F.2d 773, 778-79 (6th Cir. 1987); *United States v. Rhodes*, 779 F.2d 1019, 1027-28 (4th Cir. 1985); *Moreno v. Estelle*, 717 F.2d 171, 179-81 (5th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984). *See also Minor v. State*, 313 Md. 573, 577-78, 546 A.2d 1028, 1032-33 (1988). It would follow, *a fortiori*, that extended analysis of mere monetary penalties is unnecessary.<sup>47</sup>

Petitioners' attack on the jury system also repudiates the very history that, in their view, requires application of the Eighth Amendment to punitive damages in the first place. From the Magna Carta to the American Bill of Rights, the jury was again and again reaffirmed as a primary safeguard to *protect* the citizenry against unfair and oppressive impositions by the sovereign. *See pp.* 14-16 *supra*. Conversely, the concern that led to adoption of the Eighth Amendment and its English antecedents was abuse of the criminal sentencing process by judges acting as agents of the sovereign or, more recently, by legislatures establishing criminal punishments. *See pp.* 12-18 *supra*. For petitioners now to argue that jury decisions are entitled to *less* deference than legislative and judicial decisions about sentencing thus turns history and principle completely upside-down.

This Court has repeatedly stressed the importance of according great respect to the judgments made by juries in establishing proper sanctions. As we have discussed, the Court has noted the broad discretion allowed to juries in setting punitive damages to fit the circumstances of

<sup>47</sup> The Court need not resolve in this case whether the multifactored analysis set forth in *Solem* applies to monetary penalties. As we discuss *infra*, the award in this case would be constitutional in any event.



the case. See pp. 20-22 *supra*; *Standard Oil Co. v. Missouri*, 224 U.S. at 286; *Barry v. Edmunds*, 116 U.S. at 565; *Day v. Woodworth*, 54 U.S. (13 How.) at 371. More recently, in a case involving the penalty of death, the Court further explained that "the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" *McCleskey v. Kemp*, 481 U.S. 279, 331 (1987) (quoting H. Kalven & H. Zeisel, *The American Jury* 498 (1966)). See also *Spaziano v. Florida*, 468 U.S. 447, 489 (1984) ("[j]uries have historically been, and continue to be, a much better indicator as to whether the death penalty is a disproportionate punishment for a given offense in light of community values than is a single judge") (Stevens, J., dissenting). If juries are entitled to such respect in cases involving the ultimate penalty, there is no basis for giving them a reduced role in setting an appropriate award of punitive damages.<sup>49</sup>

#### B. The Award In This Case Is Not "Grossly Disproportionate."

Having suggested that juries are entitled to diminished respect, petitioners then propose an Eighth Amendment analysis fully in keeping with that suggestion. They do not argue that the jury here was allowed to consider anything improper, or that it was prevented from taking account of anything relevant. Rather, they ask this Court to take the same information, weigh it differently, and reach a different outcome. This approach more nearly follows the path taken in First Amendment cases—under the highly unusual standard of independent appellate review—than anything previously undertaken

<sup>49</sup> Petitioners also overstate the purported distinctions between jury awards and criminal sentences. While it is true that legislatures set sentencing "limits," the upper limit is frequently the life of the offender. See, e.g., 18 U.S.C. § 3581(b) (penalty of zero years to life imprisonment).

under the Eighth Amendment. Compare *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), with *Solem v. Helm*, *supra*; *Rummel v. Estelle*, *supra*. If the correct approach is taken, it is readily apparent that the award here is well within constitutional limits.<sup>49</sup>

#### 1. The "Offense" in this Case was a Serious One.

The first part of any inquiry into "proportionality" is to consider the gravity of the conduct at issue. Here, BFI's deliberate attempts to destroy Joe Kelley's business, using means well beyond the bounds of legitimate competition, is more than serious enough to warrant a stern penalty.

Petitioners, however, are utterly unable to come to grips with this basic fact. While they recite their obligation to view the case "in the light most favorable to respondents," Br. at 2, petitioners then go on to revive their defense at trial, suggesting that their actions in the Burlington market from 1982 to 1984 were undertaken in a "strong competitive spirit" and amounted to offering "competitive prices." Br. at 3. See also Br. at 39 ("relatively mild" tort); Br. at 39 n.24 (evidence showed a "desire to beat the competition"). But it is clear that the jury totally rejected that version of events. It was instructed that it could find against petitioners only if their conduct was "unfair and illegal." J.A. 70; see also

<sup>49</sup> The *ad hoc* and self-serving nature of the standards proposed here is suggested by the inconsistency of the analyses presented by petitioners and their *amici*. While petitioners argue that the amount of the compensatory award is a primary factor, Br. at 34; see also Br. of *Amicus Curiae* National Ass'n of Mutual Ins. Cos. at 4, several other *amici* argue that this factor is largely irrelevant, Br. of *Amicus Curiae* Goodyear Tire & Rubber Co. at 13-29; Br. of *Amici Curiae* Arthur Anderson & Co. *et al.* at 23-25. Similarly, while petitioners and others argue against giving significant weight to the size of corporate defendant, Pet. Br. 42-47; Br. of *Amicus Curiae* Navistar Int'l Transp. Corp. at 9-28, others disagree, Br. of *Amicus Curiae* Bethlehem Steel Corp. at 11; Br. of *Amicus Curiae* American Nat'l Red Cross *et al.* at 29 n.52.



J.A. 71-72 (answers to jury interrogatories). Then, with regard to punitive damages, the jury was told that it could return an award—under the standard of “clear and convincing evidence,” J.A. 81—only if “the defendants’ conduct revealed actual malice, outrageous conduct, or constituted a willful and wanton or reckless disregard of the plaintiff’s rights,” *id.* The description offered by petitioners of their own conduct is impossible to square with the verdict returned under those standards.

That verdict, as the courts below found, is amply supported by the record. There was compelling evidence that BFI was not engaging in lawful competition with Kelco but was seeking to use its enormous resources to destroy its only local competitor. The local manager of BFI’s operations was directed on at least three occasions to put Kelco out of business. Moreover, the specific strategy selected to accomplish this goal was predatory pricing of the most egregious sort. As the local sales manager testified, “If it meant give the stuff away, [we were] to give it away.” J.A. 10. This strategy was reflected in such severe price reductions that BFI was charging only a fraction of its average variable cost. It was a strategy that BFI had used in the past in an effort to gain a monopoly position. And it was a strategy that continued long after BFI was specifically warned that it was pricing in violation of the antitrust laws.

The jury thus was entitled to find, in accordance with the instructions, that an award of punitive damages would serve their stated purpose: “to punish the wrongdoer for some extraordinary misconduct, outrageous misconduct, or to serve as an example or warning to others not to engage in such conduct.” J.A. 81. While petitioners make much of the fact that their conduct was non-violent and did not threaten public safety, Br. at 38, the Constitution hardly prohibits Vermont from viewing this type of conduct as very serious. Indeed, this Court has refused to accept the notion that “non-violent” crimes must be treated as “non-serious,” pointing out that “[a]

high official in a large corporation can commit undeniably serious crimes in the area of antitrust, bribery, or clean air or water standards without coming close to engaging in any ‘violent’ or short-term ‘life-threatening’ behavior.” *Rummel v. Estelle*, 445 U.S. at 275. However, it may appear to petitioners, it was hardly a trivial matter to Joseph Kelley to find himself faced with destruction of a business into which he had put his life savings.

Petitioners insist that any analysis under the Eighth Amendment must include an assessment, first, of the “injury inflicted or threatened by [their] conduct,” which they then try to tie to the amount of compensatory damages, and second, “[t]he amount that the defendant gained or reasonably could have expected to gain from its misconduct.” Pet. Br. 34, 36. But there is no reason—other than petitioners’ dissatisfaction with the result—to think that the jury ignored considerations like actual or threatened harm, or even the possible benefits to petitioners, in making its required assessment of the conduct at issue. Furthermore, petitioners did not request any instructions with regard to such factors,<sup>50</sup> and they did not object to the charge on those grounds.<sup>51</sup> They should not be allowed to sit silently and then challenge the verdict on grounds that they could have presented to the trial court in a timely fashion. See Fed. R. Civ. P. 51.

In any event, these factors will not bear the weight that petitioners assign to them. To begin with, although this Court has referred to “harm” as one of many elements of culpability, it has made clear that the harm to be considered is the “harm caused or threatened to the victim or society.” *Solem v. Helm*, 463 U.S. at 292

<sup>50</sup> J.A. 75-76. To the contrary, petitioners indicated that they were simply seeking “the usual Vermont charges” on punitive damages. C.A. App. 1134.

<sup>51</sup> The charge itself instructed the jury that it could award punitive damages “even if there was only minimal compensatory damages.” J.A. 81.

(emphasis supplied). By jumping quickly to equate harm with the level of compensatory damages, petitioners have largely read out both the elements of "threatened" harm and the harm to society caused by deliberately unlawful conduct. *Cf. Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 118 (1986) (predatory pricing "harms both competitors and competition") (emphasis in original).

It is obvious, moreover, that the extent of actual damage often will bear little relationship to the wrongfulness of the conduct to be punished and deterred. For example, an unsuccessful attempt to murder someone may be punished severely—indeed more severely than a successful robbery—even though the bullet misses the intended victim entirely. Although this case involved an unsuccessful attempt to monopolize, not murder, the principle is no different when financial crimes are in question. As this Court put it in *Rummel v. Estelle*, *supra*, "if Rummel had attempted to defraud his victim of \$50,000, but had failed, no money whatsoever would have changed hands; yet Rummel would be no less blameworthy, only less skillful, than if he had succeeded." 445 U.S. at 276.

Petitioners, too, are "no less blameworthy" because they failed in their effort to drive respondents out of business or because they sought to harm a small business rather than a large one; if anything, this type of economic "bullying" is more worthy of sanction. It was, after all, BFI's vastly greater size that allowed it to accept short-term losses in an effort to drive out competition. A large company can frequently engage in a pattern of inflicting injuries on smaller victims, secure in the knowledge that only a few of them will be willing and able to mount a successful legal challenge. It is quite reasonable, in such a case, for a jury to award punitive damages to punish and deter misconduct that go well beyond actual injury.<sup>52</sup> As noted above, this Court

<sup>52</sup> See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. at 161 (plurality opinion) ("Especially in those cases where circum-

70 years ago upheld, against due process attack, a civil penalty for overcharging passengers that exceeded actual injury by a factor of more than 100 to 1. Although the defendant there, like petitioners here, argued that such a penalty must be in proportion to actual injury, the Court held that when the penalty "is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, . . . it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." *St. Louis, I. M. & S. Ry. v. Williams*, 251 U.S. at 67. See also *Kelly v. Robinson*, 479 U.S. at 49 n.10 ("a traditional fine, paid to the State as an abstract and impersonal entity, [is] often calculated without regard to the harm the defendant has caused").

The emphasis placed by petitioners on "potential for gain" suffers from similar flaws. Again, as a logical matter, the nature of particular conduct need bear no direct relationship to the amount of gain to be derived from it. A plot to kill someone for \$10,000 in insurance money is just as reprehensible as a plot to kill someone for \$100,000. Why would it be to petitioners' credit that its immediate goal was to establish a monopoly in a smaller not larger market?<sup>53</sup>

stances outside the publication itself reduce its impact sufficiently to make a compensatory imposition an inordinately light burden, punitive damages serve a wholly legitimate purpose in the protection of individual reputation."); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 219-21 (Colo. 1984); *Unified School Dist. No. 490 v. Celotex Corp.*, 6 Kan. App. 2d 346, 629 P.2d 196, 207 (1981); *Downey Sav. & Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835, 849 (1987), *cert. denied*, 108 S. Ct. 2023 (1988).

<sup>53</sup> We note that BFI's potential for gain as a monopolist even in the Burlington market was not insubstantial. During 1982-84, BFI and Kelco together made approximately 4525 "hauls" per year. C.A. App. 317, 1100. Using BFI's non-monopoly price of \$172 per haul, adopted in 1984, App. A. to Br. in Opp. to Cert., the potential



It is also very difficult to identify in any given situation just how the "harm" or the "gain" is to be measured. For example, it is not unusual for a tort to have negative social effects that far exceed the concrete harm done to the plaintiff.<sup>54</sup> Indeed, anticompetitive torts are a prime example of conduct that frequently has an impact (and potential benefit to the tortfeasor) beyond the immediate market. Where a large and sophisticated corporation deliberately undertakes to eliminate a small, local rival through predatory pricing, it is logical to assume that it has a reason for doing so beyond the potential for monopoly profits in that local market. That reason is likely to be the fact that "punitive behavior carries signals to . . . other firms—in future periods, in other geographic areas, and, possibly, in other lines of commerce." O. Williamson, *The Economic Institutions of Capitalism* 376 (1985).<sup>55</sup> "An important consideration is whether local entry is being attempted into a small sector of the total market where the established firm

gross revenues in this market would total over \$775,000 annually. Moreover, because BFI's average variable cost was \$104 per haul, C.A. App. 295, and it had few other fixed costs, a substantial part of that \$775,000 would be profit.

<sup>54</sup> Cf. *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) ("a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards"); Testimony of Gary G. Lynch, Director, Division of Enforcement, S.E.C., Before the United States Sentencing Commission, at 5 (Oct. 11, 1988) ("The economic approach to sanctioning undervalues the fact that, at a fundamental level, some types of crime are more serious than others. . . . A corporation's violation of the prohibition against insider trading may result in more or less quantifiable losses to other market participants. But the societal costs of one instance of insider trading go beyond the losses to specific investors in that particular instance.") (hereinafter "Lynch").

<sup>55</sup> See also Milgrom & Roberts, *Predation, Reputation, and Entry Deterrence*, 27 J. Econ. Theory 280, 281 (1982) ("[P]redation emerges as a rational, profit-maximizing strategy . . . not because it is directly profitable to eliminate the particular rival in question, but rather because it may deter future entrants."); R. Posner, *Economic Analysis of Law* 224 (2d ed. 1977).

enjoys dominance. Exploratory entry into a local geographic market or into one or a few products in a much broader line of related products would presumably enhance the appeal of sending a predatory signal." *Id.* at 377.

There was ample evidence in this case that BFI was engaging in such a strategy. It had engaged in similar predatory pricing in the past, J.A. 25, and was faced with a new local competitor—a former employee—who was gaining market share. The resulting predatory campaign was motivated by memoranda from the central office calling on all regional offices to maintain a dominant market position in any way possible. J.A. 90-96. It was therefore appropriate for the jury to respond to the message that BFI was seeking to send around the state and around the country. And this is especially true in view of the difficulty and costs of proving predatory pricing under usual circumstances,<sup>56</sup> and the resulting likelihood that other victims would not succeed in vindicating their own rights.

## 2. The Penalty Here Was Not Unreasonably Harsh.

It is difficult to imagine how, as a matter of plain language, a penalty of approximately two days' revenue could be regarded as overly "harsh" for the offense of trying to destroy a business by unlawful means. See *Solem*, 463 U.S. at 291 (referring to "harshness" of the penalty). To suggest that it is, petitioners make two basic points. First they argue that it is inappropriate, in setting a monetary penalty, to give any significant weight to the size of the defendant. Br. at 42-47. Second, they argue that the award here is disproportionate

<sup>56</sup> Absent the unusual availability of testimony by former BFI employees, it would have been very difficult in this case to establish that petitioners deliberately set prices below cost in order to destroy competition. A predatory pricing claim built solely on objective financial data is frequently hampered since the "difficulties of measuring costs are notorious." P. Areeda & H. Hovenkamp, *Anti-trust Law* ¶ 715.2a, at 552 (Supp. 1988).



to various statutory penalties in Vermont and elsewhere and to the past history of Vermont tort judgments. Br. at 39-41. These arguments, to the extent relevant, are simply incorrect.

Before turning to these points, we note again that petitioners, in arguing that a jury must give little weight to a defendant's size, are raising an issue that they failed to raise at the appropriate time in the trial court. That court specifically instructed the jury that it might "take into account" the defendants' "financial standing." J.A. 81. If petitioners believed that this instruction was improper, or needed to be qualified in some manner, they should have made that objection then. Fed. R. Civ. P. 51. Having chosen not to, J.A. 84, they are in no position now to argue that the jury committed constitutional error in returning a verdict in accordance with the instructions.

Petitioners are also asking this Court to depart from a tradition that dates from before the Magna Carta. The ability to consider the defendant's resources was a central feature of the amercement system that replaced the old Anglo-Saxon system of fixed penalties—a feature left undisturbed by the Magna Carta.<sup>57</sup> Five centuries later, when criminal fines remained largely discretionary, Blackstone argued that "the *quantum*, in particular, of pecuniary fines neither can nor ought to be ascertained by any invariable law. . . . [W]hat is ruin to one man's fortune may be matter of indifference to another's." 4 W. Blackstone, *supra*, at \*378.<sup>58</sup>

<sup>57</sup> See 2 F. Pollock & F. Maitland, *supra*, at 514 ("Account can now be taken of the offender's wealth or poverty, . . . of all those 'circumstances of the particular case' that the rigid rules of ancient law had ignored."); W. McKechnie, *supra* note 12, at 286 ("the amounts taken were regulated partly by the wealth of the offender, and partly by the gravity of the offence").

<sup>58</sup> See also J. Bentham, *Principles of the Penal Law*, in 1 *The Works of Jeremy Bentham* 401 (J. Bowring ed. 1843) ("The same nominal punishment is not, for different individuals, the same real punishment. Let the punishment in question be a fine: the sum

This same fundamental point has received recent approval as well. See, e.g., 18 U.S.C. § 3572 (in establishing fine, court should consider, *inter alia*, "the defendant's income, earning capacity, and financial resources," "the burden that the fine will impose on the defendant," and, "if the defendant is an organization, the size of the organization"); 15 U.S.C. § 1691e(b) (in assessing punitive damages for discrimination in granting credit, court shall consider, *inter alia*, "resources of the creditor"). Indeed, this Court itself has recognized the propriety of such an approach. In *Waters-Pierce Oil Co. v. Texas*, *supra*, where the Court rejected a due process challenge to a state antitrust civil penalty of \$1.6 million plus the loss of a business license, it specifically looked not only to the conduct at issue but also to the size and wealth of the defendant corporation.<sup>59</sup>

Without acknowledging any of this history, petitioners offer up an economic analysis to show that a given amount of penalty has the same effect on a large corporation as a small one. Br. at 43-46. This theory—which petitioners seem to concede is incorrect as applied to individuals, Br. at 43-44—is equally implausible with regard to corporations. At the most fundamental level, it is hard to believe that the retributive and deterrent functions of punitive damages are equally well served when two companies, one a hundred times bigger than the other, receive exactly the same monetary penalty. The need to link the penalty with the offender, which

that would not be felt by a rich man, would be ruin to a poor one.") (emphasis in original).

<sup>59</sup> See 212 U.S. at 111-12. ("The business carried on by the defendant corporation in Texas was very extensive and highly profitable, as the record discloses. The property of the defendant amounted to more than forty millions of dollars . . . . Its dividends had been as high as 700 per cent per annum.") See also *Spallone v. United States*, 109 S. Ct. 14, 18 (1988) (Marshall, J., dissenting from the grant of a stay) (fine of \$1 million per day does not violate Excessive Fines Clause in view of City's "annual budget of \$337 million").

has been recognized by numerous courts<sup>60</sup> and commentators,<sup>61</sup> reflects the strikingly obvious fact that the managers of a large corporation, with its huge aggregation of capital, simply will not base their behavior on the risk of being saddled with a penalty that would be infinitesimal by comparison.<sup>62</sup> Moreover, even if petitioners' contrary theory were more convincing, it is scarcely so absolute a truth that it must be adopted by all 50 states as the price of compliance with the Eighth Amendment. See *CTS Corp. v. Dynamics Corp. of America*, 481

<sup>60</sup> See, e.g., *Hatrock v. Edward D. Jones & Co.*, 750 F.2d 767, 772 (9th Cir. 1984) (quoting *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389, 399, 582 P.2d 980, 990 (1978)) ("Deterrence 'will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.'"); *FDIC v. W. R. Grace & Co.*, 691 F. Supp. 87, 101 (N.D. Ill. 1988) (same); *Brink's, Inc. v. City of New York*, 546 F. Supp. 403, 413 (S.D.N.Y. 1982) (Weinfeld, J.) ("If the damage award is to serve its intended objective of punishment for wrongful conduct and deterrence against repetition of a like offense, it must be sufficient to 'smart' the offender which permits a consideration of the wealth of the malefactor.")

<sup>61</sup> See, e.g., K. Elzinga & W. Breit, *The Antitrust Penalties: A Study in Law and Economics* 132 (1976) ("It should be clear . . . that an absolute monetary exaction should not be set by statute for every antitrust violator. An absolute fine level that might be an enormous deterrent for small firms might not deter larger firms from anticompetitive activity."); Lynch, *supra* note 54, at 9 ("[A] larger entity that can easily afford to pay a fine based upon a multiple of expected loss to others may not be deterred by a fine that would put a much smaller entity out of business. The largest entities will only be deterred by a standard that allows judges to consider differences in ability to pay in determining the appropriate sanction.")

<sup>62</sup> Petitioners also attempt to support their effort to curtail consideration of size by asserting that "the larger a company is, the more transactions it will engage in and the greater the frequency with which it will suffer punitive damages." Br. at 44. This argument rests on a wholly conjectural, as well as illogical, view of corporate behavior: i.e., that wanton and malicious behavior is a random event that correlates closely with the size of any given corporation. It is entirely reasonable for the individual states to determine whether that proposition is valid or not.

U.S. 69, 92 (1987) ("Constitution does not require the States to subscribe to any particular economic theory").

Petitioners also argue that punitive damage awards must be judged by comparing them to the legislative limits for criminal fines applicable to the same conduct. Putting aside the endless disputes about what statutes deal with the "same" or "similar" conduct as may be involved in a particular tort action, the fact is that such a comparison is largely meaningless. In contrast to punitive damages, criminal statutes, save those few that deal with truly petty offenses, all provide for imprisonment as well as a monetary fine. A criminal conviction, moreover, carries significant stigma and may also lead to the loss of basic civil rights, such as the right to vote or, for a corporation, the right to do business. Consequently, there is simply no way to isolate the monetary portion of a multi-factor criminal punishment and use it as a basis of comparison with an award of punitive damages.<sup>63</sup> For example, petitioners refer to the federal antitrust laws and argue that the statutory limit of a \$1 million fine demonstrates that the verdict in this case was excessive. Petitioners fail to note, however, that the same laws also provide for up to three years in prison in addition to the fine. See 15 U.S.C. § 2. Does that add up to \$6 million? Does it add up to more if the stigma of a criminal conviction is added as well?<sup>64</sup>

<sup>63</sup> A more relevant comparison would be to various Vermont statutes that authorize civil penalties of up to \$10,000 per day for ongoing violations of law. See Br. of Amici Curiae United States Chamber of Commerce *et al.* at 3a-4a (citing statutes). Here, of course, the conduct extended over many months and involved the pricing of numerous different jobs, each of which might have been a basis for a separate criminal charge.

<sup>64</sup> It also bears emphasizing here that the \$1 million fine for antitrust violations was set by Congress in 1974. That amount would, of course, be substantially increased if converted into today's dollars. Not surprisingly, therefore, the head of the U.S. Department of Justice's Antitrust Division has urged that the maximum fine for corporate violations of the Sherman Act be raised to \$10



There is, likewise, no basis for petitioners' additional argument that the treble-damage provisions of federal antitrust laws indicate the constitutionally permissible level of penalty. Br. at 40. Petitioners make no preemption argument before this Court, and they made none in the courts below. Moreover, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court declined to hold that a punitive damage award of \$10 million, in a case arising out of a plutonium leak from a nuclear facility, was preempted by a federal law authorizing a maximum civil penalty of \$25,000 for such conduct. Although the dissent took the position that "[b]y establishing maximum fines, Congress implicitly stated its views on the size of monetary penalties it deemed sufficient to achieve both punishment and deterrence," *id.* at 283 n.13, the majority rejected this view. Recognizing that large punitive damage awards complement, rather than undercut, smaller, legislatively prescribed fines, the Court held that "the award of punitive damages in the present case does not conflict" with the federal remedial scheme. *Id.* at 257.

Finally, petitioners argue that the award in this case is disproportionate to previous Vermont tort verdicts. Given the wide variety of conduct that tort verdicts may encompass, this attempted comparison is especially likely to be unreliable. See *Rummel v. Estelle*, 445 U.S. at 282 n.27 (noting that "[o]ther crimes . . . implicate other societal interests, making any such comparison inherently speculative"). Moreover, in drawing this comparison, petitioners conveniently omit the other 49 states where, by their own account, there have been comparable punitive verdicts. If awards are to be measured one against the other, it hardly makes sense to limit the field of comparison to an individual state. That is especially so here, since Vermont is a rural state with a

million. See 55 Antitrust & Trade Reg. Rep. (BNA) 797, 799 (Nov. 3, 1988) (remarks of C. Rule). Even on the basis of the artificial comparison proposed by petitioners, in short, the judgment below was not excessive.

population of half a million people where lawsuits of this kind have rarely, if ever, occurred.<sup>65</sup>

Perhaps the most telling comparison—also omitted by petitioners—is to this Court's own decisions applying the Eighth Amendment to prison sentences. In *Rummel v. Estelle*, the Court upheld life imprisonment for three minor acts of commercial fraud involving a total of approximately \$230, 445 U.S. at 265-66, and in *Hutto v. Davis* it approved a 40-year sentence for possession and distribution of nine ounces of marijuana, 454 U.S. at 370-71. See also *Graham v. West Virginia*, 224 U.S. 616 (1912) (approving life imprisonment for third conviction of horse theft). By any reasonable standard, a \$6 million award against a company the size of BFI, for the conduct that it engaged in here, must be considered much less harsh than the penalties upheld in *Rummel* and *Hutto*. Under petitioners' approach, on the other hand, while *Rummel* could receive a life sentence for three minor acts of fraud, if his victims had brought a civil action for restitution and punitive damages, they would have been limited to about a thousand dollars at most. We see nothing in the Eighth Amendment that requires so irrational an approach.

<sup>65</sup> In any event, petitioners' discussion of the Vermont experience is itself too limited. They note that \$380,000 is the largest reported punitive award in that state, Br. at 41 (citing *Coty v. Ramsey Associates, Inc.*, 546 A.2d 196 (Vt.), cert. denied, 108 S. Ct. 2903 (1988)), but they fail to note that in 1981 two Vermont juries awarded a total of \$3.85 million in punitive damages against the GAF Corporation for selling shoddy roofing materials. *Vermont Union School Dist. No. 21 v. H.P. Cummings Constr. Corp.*, Docket No. S62-76 OcC (judgment entered 1981); *Rodd v. GAF Corp.*, Docket No. S410-81 WnC (judgment entered 1981). The *Coty* case is also instructive, since the \$380,000 award, approved by the Vermont Supreme Court, was entered against a company with assets worth only \$3 million, a figure of nearly 13% compared with the 0.5% awarded here. 546 A.2d at 207. See also *Woodhouse v. Woodhouse*, 99 Vt. 91, 130 Atl. 758 (1925) (approving \$25,000 award against defendant with assets of \$1.5 million).



CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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# **REPLY BRIEF**

**In the Supreme Court of the United States**

OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., AND  
BROWNING-FERRIS INDUSTRIES, INC., PETITIONERS

v.

KELCO DISPOSAL, INC., AND JOSEPH KELLEY, RESPONDENTS

On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

**REPLY BRIEF FOR THE PETITIONERS**

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## REPLY BRIEF FOR THE PETITIONERS

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In our opening brief, we argued that massive and disproportionate punitive damages awards of the kind ordered in this case, though a comparatively recent phenomenon, present precisely the kind of problem that the Excessive Fines Clause was designed to address—the use of governmental power to impose excessive monetary punishments on wrongdoers. The leitmotif of Kelco's response, and the almost exclusive preoccupation of its *amici*, is that this case represents the culmination of an effort by "a coalition of business interests" (Kelco Br. 10)<sup>1</sup> to destroy the venerable institution of punitive damages, which is said to be a "bedrock component of Anglo-American tort law" (*id.* at 9). The Court is warned that if it affords protection against excessive punitive damages, "corporations could, in effect, purchase a license to do evil" (ATLA Br. 2; see also *id.* at 3, 27, 28).

This overblown rhetoric seeks to misdirect the Court's attention to issues that are not presented. This case involves no "attack on traditional state-law tort remedies" (Kelco Br. 10). Rather, it concerns one decidedly *untraditional* aspect of tort law—grossly excessive punitive monetary judgments—that, even if not pervasive, infects a significant and growing set of cases. See BFI Br. 10-12; American Nat'l Red Cross Br. 13-27; U.S. Chamber of Commerce Br. 10-11 & n.9.<sup>2</sup> If some verdicts (such as the \$6,000,000 punitive judgment in this case) are indeed excessive, it is surely no answer to say that many others are not (see Kelco Br. 26).

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<sup>1</sup> In fact, BFI's *amici* include such diverse groups as the American National Red Cross, the Council of Community Blood Centers, the City of New York, the American Society of Newspaper Editors, and the American Medical Association.

<sup>2</sup> The briefs of Kelco's *amici* are devoted almost entirely to explaining why punitive damages awards are sometimes socially beneficial. They do not explain, however, why *excessive* awards (*i.e.*, awards that by definition are larger than necessary to punish or deter) are an essential part of our tort system.



Significantly, the ABA study that Kelco touts for its irrelevant assertion (Br. 26) that "the sky is not falling" found "strong evidence that some very large awards are regularly—if very infrequently—assessed and that these large awards represent a large portion of the total punitive damages awarded in the jurisdictions studied." ABA Report at 2-8; see also *id.* at 6-7 ("excessive or even 'run away' verdicts do occur"). To remedy that problem, the ABA stressed the need for meaningful judicial review (*id.* at 6-6, 8-3) and recommended that any punitive damages award greater than *three times* the amount of the compensatory award carry "a presumption of excessiveness" giving rise to "a heavy burden [on] the plaintiff to demonstrate to the court, based upon the evidence in the record, that some sum larger than three times is proper" (*id.* at 6-11).

In truth, the problem of excessive punitive damages awards is one that, viewed from either the practical or the doctrinal standpoint, this Court should not ignore. As the brief filed by the Red Cross explains (at 25-26), grossly excessive punitive verdicts in the millions, tens of millions, and even hundreds of millions of dollars are being returned with increasing frequency. Even though some of the most blatant awards may have been reduced (see Kelco Br. 28 n.39), there is little assurance that they do not remain seriously excessive. And even though some cases with enormous awards may settle at lower amounts, the untoward and extortionate effects of such verdicts on the litigation process, on the general economy, and on the public welfare (see, *e.g.*, Br. of PMA and AMA) raise grave concerns. Under these circumstances, and regardless of how defensible punitive awards may be in the majority of cases, it is difficult to accept the notion that the Constitution turns a blind eye to the phenomenon of excessive punitive damages verdicts where they do occur.

Finally, because the Excessive Fines Clause performs only the limited role of setting outer boundaries, leaving the states entirely free within those broad limits to select

appropriate penalty levels, there is little to the suggestions of Kelco and its *amici* that a ruling in BFI's favor would trench unjustifiably on the province of the states in fashioning tort remedies. Nor does excessiveness review of punitive damages verdicts (or criminal fines, for that matter) thrust the courts into areas traditionally reserved for legislatures. See Kelco Br. 10-11. Where a statute sets a tailored penalty for a defendant's misconduct, judicial review is necessarily highly deferential. But where, as here, state law imposes no limits on the magnitude of the penalty a jury may inflict, Eighth Amendment scrutiny involves a quintessentially judicial determination of the kind both federal and state courts have long made.

## I. THE FEDERAL CONSTITUTION PROHIBITS EXCESSIVE PUNITIVE DAMAGES AWARDS

### A. The Excessive Fines Clause

Kelco makes no serious effort to dispute our argument that the text of the Excessive Fines Clause is broad enough to encompass punitive damages. Nor does it deny that punitive damages are penal monetary sanctions that are designed to serve the same purposes of punishment and deterrence as criminal fines.

Nonetheless, Kelco asserts that the history of Magna Carta and the English Bill of Rights precludes application of the Excessive Fines Clause to punitive damages. Kelco bears the particularly heavy burden of showing that this history is so compelling that it should overcome the constitutional language and policies. But one "[can]-not find in the cited materials anything approaching the clear evidence that would be required to create so great an exception \* \* \*." *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 355 (1977). Indeed, Kelco ignores the fact that *every commentator addressing the issue has concluded that the relevant history supports the applicability of the Excessive Fines Clause to punitive damages.*<sup>3</sup>

<sup>3</sup> See, *e.g.*, Massey, 40 VAND. L. REV. 1233 (1987); Jeffries, 72 VA. L. REV. 139 (1986); Note, 85 MICH. L. REV. 1699 (1987); Note, 75 CALIF. L. REV. 1433 (1987).

At bottom, Kelco's argument rests on three critical propositions: *first*, that the Excessive Fines Clause is limited to criminal proceedings; *second*, that the Clause applies only if the penalty is payable to the government; and *third*, that the silence of the Framers at the time the Eighth Amendment was adopted shows an intent not to regulate such awards. None of these assertions can be reconciled with the historical record.

1. In urging that the Excessive Fines Clause applies only to criminal cases, Kelco points out (Br. 23) that "many provisions of law, including provisions in the Bill of Rights, turn[] on whether the proceeding at issue is civil or criminal." But the examples Kelco offers serve merely to demonstrate the irrelevancy of this observation. Unlike the Sixth Amendment, which by its terms is confined to criminal cases (see BFI Br. 15), or the Seventh Amendment, which is expressly limited to "suits at common law," the Excessive Fines Clause is set forth without restriction. See also, *e.g.*, *Camara v. Municipal Court*, 387 U.S. 523 (1967) (Fourth Amendment applies in civil investigations). Furthermore, both historical usage and this Court's decisions establish that the companion Excessive Bail Clause is applicable to civil as well as criminal cases (see BFI Br. 14, 24)—a point to which Kelco has no response.<sup>4</sup>

Contrary to Kelco's argument, nothing in Magna Carta or the English Bill of Rights compels the conclusion that their protections against excessive monetary penalties were restricted to criminal cases. There can be no doubt that the amercements regulated by Magna Carta were imposed in litigation that was predominantly civil in

<sup>4</sup> Kelco repeatedly (Br. 7, 10, 25) misstates our position to be that "basic criminal-law protections" should be applicable in a civil punitive damages case. We espouse no such result; rather, our position is that the special protections of the Excessive Fines Clause extend to monetary penalties whether imposed in civil or criminal cases. Thus, Kelco simply begs the question when it concludes (Br. 26) that "[p]unitive damages \* \* \* should be awarded and reviewed in accordance with the standards applicable in civil cases."

character, *i.e.*, cases "brought by private individuals to secure redress for themselves." A. Harding, *A SOCIAL HISTORY OF ENGLISH LAW* 61 (1966). This is made clear by the very sentence from Blackstone that Kelco only partially quotes (at 14 n.13): "The reasonableness of fines in criminal cases has also been usually regulated by the determination of magna carta, concerning amercements for misbehaviour in matters of civil rights." 4 Blackstone \*379 (portion omitted by Kelco emphasized); see also 3 Blackstone \*398; 2 Pollock & Maitland 511-515. Indeed, Kelco's contention that amercements were exclusively a criminal penalty founders on its own recognition (Br. 12) that the law of 13th-century England drew "no clear separation between civil and criminal proceedings."<sup>5</sup>

What is more, amercements not only were imposed against defendants in litigation, but could also be awarded against unsuccessful plaintiffs on the theory that they had abused the court's processes by bringing an invalid suit. See Massey, 40 VAND. L. REV. at 1259; 62 Selden Society, *INTRODUCTION TO THE CURIA REGIS ROLLS*, 1199-1230 A.D., at 464-465 (C.T. Flower ed. 1944). And even sewer commissions, which were non-criminal tribunals established in 1531 to regulate drainage and sea walls, had the authority to impose amercements subject to the limitations of Magna Carta. See *CALLIS ON SEWERS* 210-213 (4th ed. 1824). The historical evidence thus conclusively establishes that Magna Carta's prohibition against excessive amercements was not limited to criminal punishments.

Kelco also attempts to equate amercements with criminal penalties by suggesting (Br. 14) that "an amercement was \* \* \* different from the separate concept of damages" and that "Magna Carta \* \* \* imposed no limi-

<sup>5</sup> In fact, while amercements were "the most common criminal sanction in 13th-century England" (*Solem*, 463 U.S. at 284 n.8), they were generally awarded in trespass actions, which typically combined a civil tort remedy with punishment for a petty offense. 2 Pollock & Maitland 511-514.

tation on the power of courts to order payments of damages \* \* \*." This argument is little more than a play on words. As demonstrated by the very authority Kelco quotes, "damages" in the sense used above represented a remedy for "the loss incurred" (*ibid.*), i.e., *compensatory* damages. See also Kelco Br. 16 & n.20. Compensatory and punitive damages, of course, are entirely different in history and purpose. The fact that the monetary sanction employed for punishment and deterrence is termed "punitive damages" does not make it equivalent to the compensatory damages that were unregulated by Magna Carta or the English Bill of Rights.<sup>6</sup>

2. Repeatedly emphasizing that amercements were payable to the royal treasury rather than to the private plaintiff, Kelco argues (Br. 12, 14, 24-25) that Magna Carta was little more than a medieval tax protest designed to prevent the Crown from "demand[ing] excessive monetary penalties for its own benefit" (*id.* at 12). From this it seeks to extract the principle that the proportionality requirement embodied in Magna Carta, the English Bill of Rights, and the Excessive Fines Clause is limited to exactions payable to the government. Significantly, however, Kelco cites *nothing*—not a shred of historical evidence, not a single judicial decision, not one academic commentator or treatise—to support its revisionist interpretation. In any event, it is simply wrong to say that amercements were paid only to the King; in some instances they were payable to the local lord, the sheriff, or even the sewer commission. See 2 Pollock & Maitland, at 513; CALLIS ON SEWERS, at 210-213.

As explained in our opening brief (at 26), this Court already has rejected Kelco's contention that the identity of the payee is of decisive constitutional significance. *Missouri Pac. Ry. v. Humes*, 115 U.S. 512, 522-523

<sup>6</sup> Kelco places great reliance on *Ingraham v. Wright*. We explained in our opening brief (at 23-25) why that case, which did not arise under the Excessive Fines Clause, is not dispositive here. We note in addition that none of the history discussed above was brought to the Court's attention by the briefs in *Ingraham*.

(1885). From the standpoint of the defendant whose rights are at issue, it hardly matters what disposition is made of the property that was unjustly taken from him by the excessive monetary penalty.

Furthermore, Kelco's stunted view leads to highly anomalous results that are totally at odds with rational constitutional interpretation. Under Kelco's position, for example, an exorbitant punitive damages award would be unconstitutional if it were paid into the public treasury, but not if it were exacted for the benefit of the plaintiff. By the same token, even a *criminal* fine would be outside the Excessive Fines Clause if it were paid to the victim, a victims' relief fund, or a charity. The protections of the Excessive Fines Clause (and of Magna Carta and the English Bill of Rights) would mean very little if the government could evade them simply by changing the identity of the payee.<sup>7</sup>

3. Kelco also errs in ascribing (Br. 20) significant weight to the absence of any evidence that the Framers consciously intended to curb excessive punitive damages by means of the Excessive Fines Clause. This lack of evidence is explainable by the fact that, contrary to Kelco's contention, punitive damages were far from a recognized and accepted part of the legal landscape at the time the Eighth Amendment was ratified. As Kelco itself acknowledges (Br. 18-20), the first punitive dam-

<sup>7</sup> Kelco asserts (Br. 14-15) that Magna Carta's principal protection against excessive amercements was the requirement that the amount amerced be set by a jury. This argument fails to recognize, however, that the right to a jury determination existed well before 1215 and was merely restated by Magna Carta. See McKechnie 286; 2 Pollock & Maitland 514. The jury's participation had proven insufficient to prevent excessive amercements, and Magna Carta established the principle of proportionality, to be applied by the court, as the primary safeguard. As for the jury provisions of the English Bill of Rights (see Kelco Br. 15-16 & n.17), those were limited to capital treason trials. See L. Schworer, *THE DECLARATION OF RIGHTS, 1689*, at 94-96 (1981). Following the Bill of Rights, judges could impose fines without the use of juries, but such fines had to be proportional to the offense. Massey, 40 VAND. L. REV. at 1264.



ages awards date only to 1763 in England and 1791 in America. Such cases were rare and involved instances of especially offensive intentional conduct. There was, in other words, no contemporaneous problem of excessive punitive awards in civil cases.

Kelco's historical inaccuracy aside, it is clear that the central purpose of the Eighth Amendment was to "guarantee[] at least the liberties and privileges of Englishmen." *Solem*, 463 U.S. at 285 n.10. Those rights, and the constitutional policies embodied in the Excessive Fines Clause, include protection against disproportionate monetary penalties imposed for purposes of punishment and deterrence. Excessive punitive damages awards fall squarely within that fundamental safeguard. Kelco never bothers to explain why punitive damages—which are imposed to punish past misconduct and to deter future misconduct—are not "comparable to the inherently criminal sanction of" a fine. Kelco Br. 24.

The Court should reject Kelco's unacceptable theory of constitutional interpretation, which would hold that the Excessive Fines Clause cannot reach the problem of excessive punitive damages because that was not the specific focus of the Framers' attention.

In a case like this, it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application.

*Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (Bork, J., concurring). See also *Katz v. United States*, 389 U.S. 347 (1967) (Fourth Amendment applies to electronic eavesdropping).<sup>2</sup>

<sup>2</sup> Kelco contends (Br. 22 n.32) that punitive damages are "still authorized" in Great Britain, unchecked by the provisions of Magna Carta or the English Bill of Rights. This statement is incorrect. To begin with, awards of punitive damages are strictly limited in England to cases of serious abuses committed by government officials or wrongful conduct that produces a profit for the defendant in excess of the compensation payable to the plaintiff. See

## B. The Due Process Clause

In contending that the Eighth Amendment offers no protection against excessive punitive damages, Kelco seeks to assuage concerns about the gap such a result would create in basic constitutional safeguards by assuring the Court (Br. 28-29) that the Due Process Clause and common law remedies will fill the breach in appropriate cases. But a closer reading of Kelco's argument reveals a bait and switch tactic, for the substantive standards Kelco proposes (Br. 30-32) give no meaningful protection whatever—even the most extravagant awards would be insulated from meaningful judicial scrutiny by "an almost irrebuttable presumption of constitutionality" (Br. 8).

The text and history of the Excessive Fines Clause leave little doubt that it is the constitutional provision most directly relevant to excessive punitive damages awards; it therefore "serves as the primary source of substantive protection" against such awards. *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (discussing relationship between Eighth Amendment and Due Process Clause). But if the Excessive Fines Clause is for some reason inapplicable to punitive damages, the parties agree that the Due Process Clause protects against ex-

*Rookes v. Barnard*, [1964] A.C. 1129, 1226 (Lord Devlin). Moreover, when punitive damages have been awarded, English courts do review such awards for excessiveness and have set them aside in circumstances much less egregious than that in this case. See, e.g., *Riches v. News Group Newspapers Ltd.*, [1985] 2 All E.R. 845, 859 (invalidating award of £250,000, apparently the largest punitive damages award in England's history). Finally, it is unnecessary for these courts to invoke Magna Carta or the English Bill of Rights, because they rely on the same principles as a matter of common law. See J. Holt, *MAGNA CARTA* 2 (1965) ("it is now possible and indeed justifiable for a lawyer to compose a general survey of the freedom of the individual in England without once referring to Magna Carta"). Indeed, British courts have not cited Magna Carta or the Bill of Rights in cases involving the excessiveness of criminal fines. See, e.g., *R. v. Asif*, 82 Cr. App. Rep. 123 (1985); *R. v. Farenden*, 6 Cr. App. R. (S) 42 (1984).

cessive punitive damages.<sup>9</sup> Kelco errs, however, in suggesting that the Due Process Clause allows juries virtually unreviewable discretion in selecting the amount of punishment to impose.

The three cases cited by Kelco undermine rather than support its position. In *Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912), the Court explicitly noted that state courts may "no more assess excessive damages than \* \* \* impose excessive fines" (*id.* at 286). In addition, the Court explained that the writ of *quo warranto*—which, like punitive damages, is a hybrid remedy that is part criminal and part civil in nature (see *Newman v. Frizzell*, 238 U.S. 537, 544 (1915))—was at common law "regulated by the provisions of Magna Charta and the Bill of Rights that excessive fines ought not be demanded" (224 U.S. at 286, quoting 4 Blackstone \*378). Finally, *Standard Oil* did not establish Kelco's lax due process standard, because the case involved "no claim that the fine was excessive" (224 U.S. at 288); rather, the challenge was to the power, under the procedures employed, to impose any fine at all.

*St. Louis, I. M. & S. Ry. v. Williams*, 251 U.S. 63 (1919), is likewise of no help to Kelco. There the penalty imposed pursuant to statute (\$75 for a \$.66 overcharge) was held not to be excessive because no individual passenger would have an incentive to sue for such nominal actual damages and because the railroad could wrongfully obtain substantial profit from "the numberless opportunities for committing the offense" (*id.* at 67). See

<sup>9</sup> Despite Kelco's oblique suggestions (*e.g.*, Br. 5 & n.5), there is no procedural impediment to the Court's consideration of this issue, which has been fully briefed by the parties. See *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 n.6 (1983). From the time the jury returned its extraordinary verdict, BFI has consistently pressed the same objection—that the award is excessive because grossly disproportionate to the wrongful conduct. While this consistent and clearly stated objection is presented here primarily under the Eighth Amendment, the Court is plainly free to consider the issue under any other applicable constitutional or common law principle that it may find more apt to regulate the size of punitive damages awards. See, *e.g.*, *Illinois v. Gates*, 462 U.S.

also *Seaboard Air Line v. Seegers*, 207 U.S. 73, 78 (1907). Our opening brief specifically recognized (at 35 n.21) the special problems raised by cases involving little or no actual injury—a recognition that Kelco entirely ignores in relying on *St. Louis Ry.*

Finally, *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909), does not sustain the constitutionality of exorbitant monetary sanctions. First, as in *St. Louis Ry.*, the penalty in *Waters-Pierce* had been established by statute (a maximum of \$5,000 per day); the large size of the fine resulted from the length of the defendant's continuing violation. What is more, the jury decreed a penalty of only \$1,500 per day—less than one-third the statutory maximum—a determination that was presumptively constitutional because it was within the range set by the legislature (see BFI Br. 31-32). Significantly, within four years of *Waters-Pierce* the Court struck down a penalty of \$500 for a \$.02 overcharge, holding that it was "grossly out of proportion to the possible actual damages" and therefore in violation of due process. *Missouri Pac. Ry. v. Tucker*, 230 U.S. 340, 351 (1913) (citing *Waters-Pierce* and *Standard Oil*).<sup>10</sup>

213, 220 (1983); *Braniff Airways v. Nebraska State Board*, 347 U.S. 590, 598-599 (1954). In other words, BFI's alternative arguments are "within the clear intendment" (*ibid.*) of the objection it has made throughout.

<sup>10</sup> Kelco's insistence that the verdict here satisfied common law standards is likewise untenable. Kelco agrees (Br. 30-31) that federal law governs the amount of deference accorded to a federal jury's damages award, but the standard it proposes is as toothless and ineffectual as the one it assigns to due process review. We have already said why closer scrutiny is required, and we therefore confine our response here to two errors in Kelco's submission. First, Kelco's claim that our position is foreclosed by the "two-court" rule is nonsensical: our quarrel is not with any factual findings made by the lower courts; we contend that those courts should have applied a less deferential legal standard. Similarly, Kelco's invocation of the Seventh Amendment is inapposite. Nothing in *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977), indicates that the Court's supervisory authority is limited to implementing that constitutional guarantee. Indeed, the Court in *Donovan* did not mention the Seventh Amendment at all. Given the

## II. THE \$6,000,000 PUNITIVE DAMAGES AWARD IS EXCESSIVE

### A. The Punitive Verdict In This Case Should Be Subjected To Meaningful Scrutiny.

Relying on statements in this Court's opinions in *Solem* and *Rummel v. Estelle*, 445 U.S. 263 (1980), and on the observation that monetary exactions will rarely if ever be as serious as a sentence of life imprisonment, Kelco contends (Br. 33-36) that review of monetary penalties under the Excessive Fines Clause should be "highly deferential"; proportionality analysis of the type utilized in *Solem* is in its view "unnecessary" in assessing the constitutionality of "mere monetary penalties." We can certainly understand why Kelco wishes to shield the award in this case from meaningful constitutional scrutiny, but its efforts are unavailing.

First, Kelco glosses over the constitutional text itself. The Excessive Fines Clause expressly mandates proportionality review of monetary penalties by prohibiting the imposition of "excessive fines"; *Solem* rests on the Cruel and Unusual Punishments Clause, which contains no comparable express quantitative restriction. The Framers' decision to include an explicit prohibition of disproportionate fines in the Eighth Amendment weighs heavily in favor of scrutiny at least as searching as that applied in *Solem*. See also BFI Br. 30 (discussing *Stack v. Boyle*). Kelco's approach, conversely, would effectively read the Excessive Fines Clause out of the Constitution on the ground that its reach is limited to the "mere monetary penalties" that Kelco would categorize as *per se* constitutional.

Close scrutiny of the punitive damages award in this case is necessary for a second reason as well: the penalty imposed upon BFI was not established by the

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rejection of the jury trial claim with respect to the calculation of the civil penalty in *Tull v. United States*, 481 U.S. 412, 425-427 (1987), meaningful review of juries' punitive damages awards could not run afoul of the policies embodied in the Seventh Amendment.

legislature. In *Rummel*, which involved a mandatory life sentence, the Court stated that its prior decisions rejecting proportionality challenges to prison sentences rested on a "reluctance to review legislatively mandated terms of imprisonment." 445 U.S. at 274 (emphasis added); see also *Solem*, 463 U.S. at 290; *id.* at 314 (dissenting opinion); *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (lower court decision applying Eighth Amendment proportionality analysis to invalidate legislatively authorized sentence "sanctioned an intrusion into the basic line-drawing process that is 'properly within the province of legislatures, not courts'" (citation omitted). Where, as here, the legislature has not even authorized the challenged punishment, much less required it, more searching review is plainly appropriate. See BFI Br. 31-32.

Kelco simply ignores the emphasis on deference to legislative decisionmaking in this Court's proportionality cases, contending (Br. 35-36) that a jury's decision about the appropriate level of punishment is entitled to equal or greater deference. But Kelco offers no support for the counterintuitive proposition that sentencing decisions rendered by a single unguided jury should be treated with the same respect as statutes enacted by the legislature—which has the ability to assess the relative severity of different classes of offenses and bring to bear the views of the entire community.

Indeed, jury sentencing in the criminal context—where the jury's discretion is at least limited by a legislatively-prescribed range—has been criticized on the ground that "the transitory nature of jury service virtually precludes rational sentencing." President's Comm'n on Law Enforcement and Administration of Justice, Task Force on Administration of Justice, TASK FORCE REPORT: THE COURTS 26 (1967); see also ABA, STANDARDS FOR CRIMINAL JUSTICE § 18-1.1 at 18-17 to 18-19 (2d ed. 1980). It is inconceivable that a criminal fine set by a jury given the vaguest of guidance and unbounded discretion would be accorded less scrutiny under the Excessive Fines Clause than one set by a court within statutorily prescribed limits.



### B. The \$6,000,000 Award Is Not Reasonably Related To BFI's Conduct.

Kelco does not take issue with our submission (Br. 28-30) that a monetary penalty is invalid under the Excessive Fines Clause if it exceeds an amount reasonably necessary to fulfill the purposes of punishing and deterring the defendant's conduct (Kelco Br. 33). For all its efforts to negate our arguments, Kelco never affirmatively demonstrates how the \$6,000,000 award in this case is reasonably proportioned to BFI's conduct. Instead, in the end, Kelco simply falls back on the justification for the award that it has consistently advanced throughout this litigation—BFI's size—stating that the exaction amounts only to "approximately two days' revenue" (Br. 33, 43). That rationale is insufficient to satisfy the Excessive Fines Clause.<sup>11</sup>

Before turning to Kelco's substantive arguments, we address two procedural issues. First, Kelco several times points out (Br. 4, 39, 44) that BFI did not object to the part of the jury charge concerning calculation of punitive damages. But BFI does not here challenge the correctness of the jury instructions or any other procedural ruling at trial. Rather, its constitutional claim relates to the determinations by the courts below that the jury verdict is not so excessive as to violate the Constitution. Since that issue could arise only on post-verdict review, BFI's failure to object to the jury charge is irrelevant. See *City of St. Louis v. Praprotnik*, 108 S.Ct. 915, 921-922 (1988). As Kelco acknowledges (Br. 5), BFI raised the Excessive Fines Clause issue at the earliest possible opportunity—in its motion for post-trial relief.

Second, Kelco suggests (Br. 36-37) that our approach is unusual because it calls for the reviewing court itself to examine the evidence submitted to the jury, rather

<sup>11</sup> Kelco at one point (Br. 37 n.49) attacks the standard we propose as "ad hoc and self serving," but our standard follows closely the path marked by this Court in *Solem*. See also *United States v. Bushner*, 817 F.2d 1409 (9th Cir. 1987) (applying *Solem* test to Excessive Fines Clause challenge to criminal forfeiture).

than simply accepting the jury's determination. But that is precisely what courts do whenever they consider a claim that a jury verdict is excessive under state law or federal common law. See also *Jackson v. Virginia*, 443 U.S. 307 (1979).

### 1. Injury Inflicted And Probable Gain

Kelco does not even attempt to justify the \$6,000,000 award by reference to the \$51,000 in actual damage that it suffered as a result of BFI's conduct. It tries instead to belittle the significance of this factor by contending (Br. 40-41) that actual injury inflicted is not a useful measure of the wrongfulness of a defendant's conduct. Congress's adoption of a number of statutes that base monetary penalties on the plaintiff's actual damages (see BFI Br. 34-35, 40 & n.26) is a sufficient rejoinder to Kelco's assertion. Moreover, we have not argued that actual injury is the sole relevant criterion; and we specifically noted in our opening brief (at 35 n.21) that actual injury may not be relevant in cases, such as those discussed by Kelco (Br. 40-41 & n.52), that involve only nominal compensatory damages.<sup>12</sup>

Kelco also challenges (Br. 41) the relevance of BFI's potential gain from its tort. In so doing, it ignores the special utility of this factor with respect to economic torts. Other considerations being equal, an attempt to steal \$1,000,000 indisputably is more serious than an attempt to steal \$10,000; more significantly, the amount of punishment needed to deter an economically motivated wrong is surely related to the size of the wrongdoer's perceived gain.<sup>13</sup>

<sup>12</sup> Although Kelco cites the harm *threatened* by a defendant's conduct as a more relevant measure of the wrongfulness of an offense, it makes no effort to prove that the award here can be justified by that factor. That is because it is unable to refute our showing (Br. 35-36 n.22) that even if BFI had driven Kelco out of business, Kelco's loss would still not have come close to supporting the \$6,000,000 verdict.

<sup>13</sup> Kelco makes a feeble effort (Br. 41-42 n.53) to establish BFI's potential gain. Fixing BFI's potential annual gross revenues at

Recognizing that it cannot justify the \$6,000,000 award by reference to the facts of this case, Kelco imagines (Br. 42-43) that BFI could have intended its predatory prices to have an impact in *other* markets and that the award should be upheld on that basis. But there simply is no evidence indicating that BFI's conduct was intended to send a message to other markets or that its price-cutting was even known to any actual or potential competitor outside the Burlington market.<sup>14</sup> Nor would evidence of signaling, if it existed, support BFI's enormous punishment. Significantly, federal law limits recovery to treble damages even where there is clear evidence of signaling.

## 2. Nature Of The Offense

Kelco describes BFI's conduct at considerable length (Br. 37-39), as if detail might somehow make the offense appear more severe. All that this recitation really addresses, however, is whether the record supports the jury's finding of liability, i.e., that BFI cut its prices for the purpose of driving Kelco from the market.<sup>15</sup> But

\$775,000, Kelco would subtract variable costs of more than \$470,000, leaving \$305,000. Of course, in order to isolate the incremental profit attributable to the elimination of Kelco, it also would be necessary to subtract BFI's annual fixed costs (which are not quantified in the record) and the profit BFI would have earned if Kelco had remained in the market. BFI's potential gain also would have to be offset by the costs incurred as a result of the low prices necessary to drive BFI out of the market. Again, the potential gain plainly could not come close to supporting the penalty imposed here.

<sup>14</sup> Kelco's "ample evidence" (Br. 43) is nonexistent. The part of the record that it cites contains one phrase from Kelly's own testimony that might be read to indicate that BFI had on other occasions engaged in predatory pricing in order to gain a dominant position in a particular market. That single self-serving and uncorroborated statement does not show that BFI's prior predatory pricing, if it occurred, was intended to or had the effect of signaling to potential competitors in other markets.

<sup>15</sup> Many of Kelco's details are simply wrong. For example, Kelco has greatly exaggerated the effect of BFI's low prices. First, Kelco

this merely constitutes the tort itself; it does not show such an aggravated version as to justify the size of the award here.

Furthermore, it does not trivialize the offense of predatory pricing to make the rather obvious point that, considered in relation to the other sorts of conduct for which punitive damages may be imposed, predatory pricing is one of the less serious delicts. Conduct involving harm to persons is universally viewed as more severe than that involving harm to property—a point that Kelco implicitly acknowledges by repeatedly referring to violent crimes in its illustrations (see Br. 40, 41). Even among economic offenses, it is significant that conduct such as fraud and price-fixing frequently lead to criminal liability, whereas the federal government will not prosecute for predatory pricing (see BFI Br. 40).<sup>16</sup>

asserts (Br. 3) that BFI's prices caused an immediate 30% drop in Kelco's revenues; but, as we explained in our reply brief at the petition stage (at 3), Kelco's business declined every year at this time because of reduced construction activity during the Vermont winter. Second, Kelco did not "lose money in 1983" (Br. 3 n.4); for that year, which included the six months that BFI charged low prices, Kelco showed a profit on its financial statement. C.A. App. 327-329, 1260, 1269. Third, Kelco's claim (Br. 3) that it "could not repair or replace equipment" during 1983 and 1984 is also in error: Kelco's financial statement shows that it purchased more than \$17,000 worth of equipment during 1983. C.A. App. 1270.

Kelco also suggests (Br. 40) that BFI's conduct was especially heinous because BFI picked on a small competitor. This disparity is inherent in the nature of predatory pricing—a small competitor with no hope of driving its larger rival out of business could not be found liable because the plaintiff could not show that the defendant's attempt to monopolize was likely to succeed.

<sup>16</sup> Kelco argues (Br. 43 & n.56) that predatory pricing is difficult to prove because a plaintiff rarely is able to obtain direct testimony regarding the alleged predator's intent. But proof of the defendant's prices and costs, not evidence regarding the subjective intent of its employees, is the *sine qua non* of a predatory pricing case. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117

### 3. Analogous Statutory Penalties and Prior Vermont Punitive Damages Awards

Unable to find any statutory penalty—civil or criminal—that comes close to justifying the punitive award in this case, Kelco is forced to argue that statutory penalties are inappropriate benchmarks. Thus, Kelco claims (Br. 47) that legislatively-authorized criminal monetary sanctions should not be considered because criminal statutes typically provide for imprisonment as well as a fine. This overlooks the fact that BFI is a corporation and cannot be imprisoned; a fine is the only criminal penalty applicable to corporations.<sup>17</sup>

The most appropriate benchmarks, of course, are the state and federal antitrust laws, which provide a civil penalty of at most treble damages. Kelco's argument (Br. 48) that the federal antitrust laws do not preempt state tort law is entirely beside the point. We do not make a preemption argument. But that does not mean that the Court should disregard the penalties prescribed in the federal antitrust laws and analogous state provisions, for they represent society's considered judgment about the appropriate punishment for anticompetitive conduct. The tremendous disparity between that amount and the punitive award here—more than 39 times greater than treble damages—is weighty evidence indeed of the disproportionality of the punitive damages award.

Finally, because Kelco is unable to find a Vermont punitive damages award that even approaches \$6,000,000, it again is forced to argue that the level of prior Ver-

(1986); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983).

<sup>17</sup> Kelco allows (Br. 47 n.63) that Vermont civil penalties might provide an appropriate yardstick. Most of the penalties for economic offenses are several hundred dollars per day or per offense; virtually none is higher than \$2,000. See U.S. Chamber of Commerce Br. App. B. Even if BFI's penalty were calculated by reference to the entire six-month period during which it was found to have entered into contracts at predatory prices, the amount would be only 6% of the \$6,000,000 punitive damages award.

mont awards is irrelevant. Br. 48-49 & n.65.<sup>18</sup> *Solem* itself looked to the sanctions that the particular jurisdiction imposed for other offenses in order to determine whether the sentence before the Court was disproportionate in view of the particular state's punishment structure. See 463 U.S. at 291, 298-300. Consideration of the level of Vermont punitive damages awards performs the same function here.

### 4. The Size Of The Defendant

As in the courts below, Kelco ultimately is reduced to relying on BFI's size as the principal if not the sole justification for the amount of the punitive damages award (see Br. 9, 33, 43). Kelco devotes considerable space to the contention (Br. 44-47) that the Constitution does not bar consideration of the defendant's size in fixing a monetary punishment.

The problem with Kelco's argument is that it is directed to a contention that has not been advanced: we have not urged the Court to hold that the defendant's size is constitutionally irrelevant. See Kelco Br. 43.<sup>19</sup> Although we do in fact question the extent to which a corporate defendant's size is relevant in fixing the

<sup>18</sup> In an effort to create the impression that there is some Vermont precedent for the award in this case, Kelco combines (Br. 49 n.65) two awards rendered by different juries in unrelated cases. Not only is the total of \$3.85 million still considerably less than the award here, but neither award endured: the \$1.6 million punitive award in *Vermont Union School Dist. No. 21* was reversed on other grounds on appeal, see 469 A.2d 742 (1983); we are informed by counsel for the defendant that the *Rodd* case was settled.

<sup>19</sup> Much of the authority cited by Kelco is inapposite. Thus, *Magna Carta* permitted consideration of the defendant's resources to reduce an amercement, not to increase it. BFI Br. 19 n.11. Contrary to Kelco's suggestion (Br. 45 and n.59), nothing in this Court's opinion in *Waters-Pierce* indicates that the jury had considered the overall size or wealth of the defendant in fixing the amount of the penalty; instead, the Court upheld the penalty by reference to the defendant's "very extensive and highly profitable" business resulting from the widespread offenses themselves (212 U.S. at 111).



appropriate penalty (see also *Navistar Br.*), this Court need do no more than overturn the court of appeals' holding that the size of a monetary penalty may be justified *solely* by reference to the defendant's wealth. See Pet. App. 11a. The burden of our argument is that the severity of the punishment must bear *some* reasonable relationship to the defendant's conduct.

Thus, the Court need not hold that a defendant's wealth is always irrelevant in order to give BFI relief. A range of penalties may bear a reasonable relationship to the defendant's conduct in a given case. If the defendant is poor, awards at the higher end of that range might well be irrational because they would overpunish and overdeter the defendant; if the defendant instead is extremely wealthy, awards at the upper end of the range might be permissible. But to say that wealth may determine what fine to set within the range of penalties appropriate to a defendant's conduct is not the same as saying that a penalty may be sustained exclusively or predominantly on the basis of the defendant's size.

The absurdity of allowing a penalty to be based on a defendant's wealth alone is aptly demonstrated by Kelco's assertion that "[i]t is difficult to imagine how . . . a penalty of approximately two days' revenue could be regarded as overly harsh" in this context (*Br.* 43). That approach would justify a \$6,000,000 fine against BFI for willful and persistent double-parking; and it would permit the imposition of a \$450,000,000 fine against Exxon for trying to put Kelco out of business by predatory pricing. Indeed, Kelco's theory has no limiting principle; it provides no basis for determining whether \$12,000,000 ("only" four days' revenues) or even \$60,000,000 (20 days' revenues) would be too much. The Excessive Fines Clause should not be construed to tolerate such arbitrary results.

Respectfully submitted.

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**AMICUS CURIAE**

**BRIEF**

MOTION FILED  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., and  
BROWNING-FERRIS INDUSTRIES, INC.,  
*Petitioners,*

v.

KELCO DISPOSAL, INC., and JOSEPH KELLEY,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit

**MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE  
AND BRIEF FOR MOTOR VEHICLE MANUFACTURERS  
ASSOCIATION OF THE UNITED STATES, INC.,  
PRODUCT LIABILITY ADVISORY COUNCIL, INC.,  
AND NATIONAL ASSOCIATION OF MANUFACTURERS  
OF THE UNITED STATES OF AMERICA  
IN SUPPORT OF THE PETITION**

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November 1, 1988

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

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No. 88-556

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BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., and  
BROWNING-FERRIS INDUSTRIES, INC.,  
*Petitioners,*

v.

KELCO DISPOSAL, INC., and JOSEPH KELLEY,  
*Respondents.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
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MOTION OF THE MOTOR VEHICLE MANUFACTURERS  
ASSOCIATION OF THE UNITED STATES, INC.,  
PRODUCT LIABILITY ADVISORY COUNCIL, INC.,  
AND NATIONAL ASSOCIATION OF MANUFACTURERS  
OF THE UNITED STATES OF AMERICA  
FOR LEAVE TO FILE BRIEF AS AMICI CURIAE  
IN SUPPORT OF THE PETITION

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Pursuant to Rule 36 of the Rules of this Court, The  
Motor Vehicle Manufacturers Association of the United  
States, Inc. ("MVMA"), Product Liability Advisory  
Council, Inc. ("Advisory Council"), and National Asso-  
ciation of Manufacturers of the United States of Amer-

ica ("NAM") request leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for the petitioners has consented to the filing of this brief; counsel for the respondents has withheld consent.

MVMA is a trade association whose member companies build motor vehicles and manufacture industrial, lawn, and agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches, and gasoline and diesel engines for various industrial and agricultural uses.

The Advisory Council is an association of industrial companies that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability.

NAM is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

The most comprehensive impartial analysis of jury verdicts in the United States in the last two decades shows that business activities by manufacturers such as those who constitute the memberships of MVMA, the Advisory Council, and NAM have borne the brunt of a massive and discriminatory increase in punitive damages verdicts. Researchers for the RAND Institute for Civil Justice have concluded that "[c]orporate defendants are in fact more likely than individuals or public agencies to be the target of [punitive damages] awards" and that "[p]unitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical*

*Findings* iii, 50 (1987).<sup>\*</sup> Even more disturbing is that "[j]uries also award more money when the defendants are institutions or organizations rather than individuals—the 'deep-pocket' effect. . . . [W]e can detect a separate, statistically independent effect for deep-pocket defendants, even in cases that do not involve products or malpractice." D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 21 (1987).

Thus, the members of MVMA, the Advisory Council, and NAM have suffered multi-layered, systematic discrimination at the hands of juries under the present system. Moreover, the wealth of manufacturing corporations appears to have affected even appellate review of punitive damages awards. The RAND researchers have stated:

Considerations of . . . defendants' wealth might also affect judicial review of punitive damages. Our survey to determine final award disposition indicated that awards against business defendants were reduced less by post-trial actions than were awards against individuals. . . . [T]he results suggest that not only do business defendants have larger punitive awards assessed against them, but they are also likely to pay a greater portion of those awards.

*Id.* at 53.

These studies confirm what the punitive damages award in this case, unprecedented in the State of Vermont, demonstrates: By establishing neither a specified maximum of any kind nor objective standards by which the size of punitive awards are to be fixed at trial or reviewed on appeal, punitive damages laws in the great majority of the states have resulted in punishments that, both in frequency and in size, are discriminatory and

<sup>\*</sup> The authorities cited in this motion are also cited in the accompanying brief. The location of these authorities within the brief can be determined by referring to the Table of Authorities.

disproportionate to the harm caused and to the culpability involved. Those laws directly impose on manufacturers, and indirectly impose on consumers and workers, the burden of unnecessary, unjustified punishments.

Accordingly, MVMA, the Advisory Council, and NAM seek to submit this *amicus curiae* brief to assist the Court in evaluating the public importance and practical consequences of the punitive damages question presented in the petition for a writ of certiorari. MVMA, the Advisory Council, and NAM respectfully request that their motion for leave to file the accompanying brief as *amicus curiae* be granted for that purpose.

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November 1, 1988

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

\_\_\_\_\_  
 No. 88-556  
 \_\_\_\_\_

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., and  
 BROWNING-FERRIS INDUSTRIES, INC.,  
*Petitioners,*

v.

KELCO DISPOSAL, INC., and JOSEPH KELLEY,  
*Respondents.*

\_\_\_\_\_  
 On Petition for a Writ of Certiorari to the  
 United States Court of Appeals  
 for the Second Circuit  
 \_\_\_\_\_

BRIEF FOR MOTOR VEHICLE MANUFACTURERS  
 ASSOCIATION OF THE UNITED STATES, INC.,  
 PRODUCT LIABILITY ADVISORY COUNCIL, INC.,  
 AND NATIONAL ASSOCIATION OF MANUFACTURERS  
 OF THE UNITED STATES OF AMERICA  
 IN SUPPORT OF THE PETITION  
 \_\_\_\_\_

**INTEREST OF THE AMICI CURIAE**

MVMA is a trade association whose member companies build motor vehicles and manufacture industrial, lawn, and agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches, and gasoline and diesel engines for various industrial and

agricultural uses. The Advisory Council is an association of industrial companies that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. NAM is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. The interest of MVMA, the Advisory Council, and NAM in the punitive damages question presented in the petition for a writ of certiorari is fully described in the accompanying motion for leave to file this brief as *amici curiae* in support of the petition.

#### PRELIMINARY STATEMENT

The petition for a writ of certiorari, the brief in opposition to the petition, and the opinion of the court of appeals below are in agreement as to the following facts on which MVMA, the Advisory Council, and NAM rely in urging this Court to grant the petition.

The jury below found the defendants liable for an attempt to monopolize in violation of the federal antitrust laws and for tortious interference with contractual relations under Vermont law. The jury returned a verdict for \$51,146 in compensatory damages on the antitrust count and for \$51,146 in compensatory damages and \$6 million in punitive damages on the state tort law count. Federal antitrust law provided for automatic trebling of the antitrust award and for attorneys' fees, so that judgment on the federal count was in the sum of \$365,938. The alternative judgment on the state count was in the sum of \$6,066,082.74.

Because the two awards were based on the same conduct, the trial court judgment requires the plaintiffs to

elect between the alternative federal and state remedies. If selected, the state remedy will provide a punitive award almost twenty times larger than the sum of attorneys' fees and punitive damages provided for by the federal law.

The defendants attacked the \$6 million punitive damages award as a violation of the Excessive Fines Clause of the Eighth Amendment. Neither the plaintiffs nor either of the courts below has suggested that this issue was not properly preserved. It is this issue that MVMA, the Advisory Council, and NAM urge this Court to review.

#### REASONS FOR GRANTING THE PETITION

##### I. REVIEW BY THIS COURT OF THE CONSTITUTIONALITY OF PUNITIVE DAMAGES JUDGMENTS SUCH AS THE ONE IMPOSED BELOW IS NEEDED BECAUSE OF THE IMPORTANCE OF THE ISSUE TO MANUFACTURERS AND TO THE CONSUMING PUBLIC.

The most comprehensive impartial analysis of jury verdicts in the United States in the last two decades, an empirical study by the RAND Institute for Civil Justice, shows that the growth in the average award in the types of litigation that manufacturers regularly find themselves defending "has been truly explosive, reflecting increases ranging from 200 to more than 1,000 percent" in only two decades. D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 18 (1987). A primary element in that explosion has been the phenomenal increase in both the frequency and the size of punitive damages awards against manufacturers.

Before 1970, for example, there was only one reported appellate court decision upholding an award of punitive damages in a product liability case, and that was an award of \$250,000. See *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Today,



hardly a month goes by without a multi-million-dollar punitive damages verdict against a manufacturer. See, e.g., *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987) (\$10 million punitive damages verdict), *cert. denied*, 108 S. Ct. 2014 (1988); *Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981) (\$5 million punitive damages verdict), *cert. denied*, 459 U.S. 880 (1982); *Kociemba v. G.D. Searle & Co.*, 16 Prod. Safety & Liab. Rep. (BNA) 893 (D. Minn. Sept. 12, 1988) (\$7 million punitive damages verdict); *Ealy v. Richardson-Merrell, Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 740 (D.D.C. Oct. 1, 1987) (\$75 million punitive damages verdict, remitted to zero); *Cessna Aircraft Co. v. Fidelity & Cas. Co.*, 616 F. Supp. 671 (D.N.J. 1985) (\$25 million punitive damages verdict); *George v. Raymark Industries Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 865 (Del. Super. Ct. Nov. 9, 1987) (\$75 million punitive damages verdict); *Masaki v. General Motors Corp.*, 16 Prod. Safety & Liab. Rep. (BNA) 225 (Haw. Cir. Ct. Feb. 29, 1988) (\$11.25 million punitive damages verdict); *Stambaugh v. International Harvester Co.*, 102 Ill. 2d 250, 464 N.E.2d 1011 (1984) (\$15 million punitive damages verdict, remitted to \$650,000); *Kemner v. Monsanto Co.*, 15 Prod. Safety & Liab. Rep. (BNA) 884 (Ill. Cir. Ct. Oct. 22, 1987) (\$16.25 million punitive damages verdict); *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987) (\$7.5 million punitive damages verdict); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W. 2d 826 (Minn. 1988) (\$12.5 million punitive damages verdict, remitted to \$4 million), *petition for cert. filed*, 57 U.S.L.W. 3296 (U.S. Oct. 14, 1988); *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. App. 1986) (\$100 million punitive damages verdict, remitted to \$10 million); *Roberts v. Seven-Up*, 16 Prod. Safety & Liab. Rep. (BNA) 466 (Utah Dist. Ct. Feb. 18, 1988) (\$10 million punitive damages verdict, remitted to \$375,000).

The effect of these massive punitive awards on American industry has been, and continues to be, devastating.

At least two major American manufacturers have been driven into the bankruptcy courts by multi-billion-dollar punitive damages claims. See *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); *In re A.H. Robins Co.*, 85 B.R. 373 (E.D. Va. 1988). Important health products have drastically risen in price or been withdrawn from the market altogether. See *Brown v. Superior Court*, 44 Cal. 3d 1049, 1064, 245 Cal. Rptr. 412, 421, 751 P.2d 470, 479 (1988) (discussing withdrawal of Bendectin from market after price increased by more than 300 percent; also discussing withdrawal of all but two manufacturers of diphtheria-pertussis-tetanus vaccine, and price increase from eleven cents per dose to \$11.40 per dose in four years); Franklin & Mais, *Tort Law and Mass Immunization-Programs* (1977) (discussing drug manufacturers' refusal to supply influenza vaccine until Government assumed the risk of lawsuits resulting from injuries caused by the vaccine). Equally important new products have been withheld from introduction altogether. See *Brown v. Superior Court*, 44 Cal. 3d at 1065, 245 Cal. Rptr. at 421, 751 P.2d at 480 (discussing non-introduction of new drug for the treatment of vision problems because of unavailability of adequate liability insurance). American manufacturers have fallen behind in the development of major product groups. See, e.g., Connell, *The Crisis in Contraception*, 1987 Technology Review 47 (statement by Elizabeth B. Connell, M.D., member of FDA Obstetrics and Gynecology Advisory Committee, that "the United States is losing its leadership role in this area [of contraceptive technology]—with potentially disastrous consequences for women and men in this country and elsewhere").

A less obvious effect of these Draconian punishments is that they spawn more frivolous lawsuits, prolong trials, and generate more appeals, all of which further disrupt the country's manufacturing activities. Moreover, the unpredictability of such awards makes it considerably more

difficult for manufacturer-defendants and plaintiffs to evaluate cases for settlement.

The effect of these burdens on manufacturers has been felt as a "tax" on every product purchased by consumers:

The tax accounts for 30 percent of the price of a stepladder and over 95 percent of the price of childhood vaccines. It is responsible for one-quarter of the price of a ride on a Long Island tour bus and one-third of the price of a small airplane . . . . [I]t adds more to the price of a football helmet than the cost of making it. The tax falls especially hard on prescription drugs, doctors, surgeons, and all things medical.

P. Huber, *Liability: The Legal Revolution and Its Consequences* 3 (1988).

In sum, the unpredictability and magnitude of punitive damages awards against manufacturers is rapidly eroding the very foundation of our industrial base and is detracting from the health and comfort of the consuming public. There is an urgent need for this Court to decide whether the Constitution provides some level of protection against the arbitrariness and excessiveness of this system.

## II. REVIEW IS URGENTLY NEEDED BECAUSE THE STATES HAVE FAILED TO ADDRESS THE SYSTEMIC INFIRMITIES THAT THIS COURT HAS SUGGESTED SHOULD BE ADDRESSED.

Twice in the last two years, this Court has suggested that the prevailing punitive damages system presents constitutional issues that need to be addressed. *See Bankers Life & Cas. Co. v. Crenshaw*, 108 S. Ct. 1645, 1651 (1988); *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580, 1589 (1986). Nevertheless, few states have acted to cure the systemic infirmities that have led to the rash of arbitrary, excessive punitive damages awards described above. It is apparent that the matter will only worsen until this Court acts.

### A. Review by This Court of Punitive Damages Judgments Imposed Pursuant to State Laws That Specify No Maximum Level, No Required Relationship to the Harm Caused, No Required Relationship to the Punishments for Other Acts of Wrongdoing, and No Other Objective Standard Is Urgently Needed.

The salient characteristic of the general punitive damages laws of Vermont and most other states is that the jury is told only that it may, in its discretion, impose punitive damages in an amount sufficient to punish or deter. *See, e.g.*, C.A. App. 1180; Illinois Pattern Jury Instructions: Civil 35.01 (2d ed. 1971); Pattern Instructions for Kansas 9.44 (2d ed. 1977); Missouri Approved Jury Instructions 10.01-6 (3d ed. Supp. 1987). The jury receives no guidance with respect to the appropriate measure of punitive damages. No maximum award is specified by the legislature or by the courts. No specified relationship between the harm caused and the size of the punitive award is required. No specified relationship between compensatory damages and punitive damages is required. No proportion between the punishment imposed in one case for one type of wrongful conduct and the punishment imposed in other cases for other types of conduct is required. No relationship between the punishment imposed in one case for particular conduct and the punishment imposed in other cases for identical conduct is required. No instruction is given as to what must be considered or what must not be considered by the jury in determining the amount of punishment. No instruction regarding the deterrent and retributive functions of compensatory damages and defense costs is given.

Moreover, these same states provide that, once a jury has awarded punitive damages, a reviewing court "may interfere . . . only if [the award is] 'manifestly and grossly excessive.'" *Pezzano v. Bonneau*, 133 Vt. 88, 91, 329 A.2d 659, 661 (1974). *Accord, e.g., Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 480, 738 P.2d 1210, 1238



(1987); *Blevins v. Cushman Motors*, 551 S.W.2d 602, 615 (Mo. 1977); *Statler v. Catalano*, 167 Ill. App. 3d 397, 404, 521 N.E.2d 565, 572 (1988).

As this Court has observed, the result of such unchanneled discretion subject to such minimal review is that

[i]n most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

The most comprehensive impartial analysis of jury verdicts in the United States in the last two decades shows that the result of this system has been that businesses have borne the brunt of massive, discriminatory punitive damages verdicts. Researchers for the RAND Institute for Civil Justice have concluded that "[c]orporate defendants are in fact more likely than individuals or public agencies to be the target of [punitive damages] awards" and that "[p]unitive awards against businesses were far larger than those against individuals in both personal injury and business contract cases." M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* iii, 50 (1987). Even more disturbing is that "[j]uries also award more money when the defendants are institutions or organizations rather than individuals—the 'deep-pocket' effect. . . . [W]e can detect a separate, statistically independent effect for deep-pocket defendants, even in cases that do not involve products or malpractice." D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 21 (1987).

Thus, manufacturers have suffered multi-layered systematic discrimination at the hands of juries under the present system. Moreover, the wealth of manufacturing corporations appears to have affected even appellate review of punitive damages awards. The RAND researchers have stated:

Considerations of . . . defendants' wealth might also affect judicial review of punitive damages. Our survey to determine final award disposition indicated that awards against business defendants were reduced less by post-trial actions than were awards against individuals. . . . [T]he results suggest that not only do business defendants have larger punitive awards assessed against them, but they are also likely to pay a greater portion of those awards.

*Id.* at 53.

Punishments imposed under these circumstances violate a fundamental tenet of American law, a tenet that this Court has cogently summarized in another context:

Juries are invariably given careful instruction on the law and how to apply it before they are authorized to decide the merits of a lawsuit. *It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. . . . It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.*

*Gregg v. Georgia*, 428 U.S. 153, 192-93 (1976) (discussing detailed statutory guidelines provided for jury and for reviewing court to decide whether to impose capital punishment) (emphasis added).

Because punitive damages imposed under these circumstances are not based on any articulated or identifiable standard, they are "excessive" under both of the tests used by this Court in determining the constitu-



tionality of punishments under the Eighth Amendment. The first such test holds that a "punishment is excessive . . . if it is unnecessary." *Furman v. Georgia*, 408 U.S. 238, 279, 331 (1972) (Brennan & Marshall, JJ., concurring). Accord *Gregg v. Georgia*, 428 U.S. at 173 (plurality opinion). The second is that punishments must be proportionate to the wrongs committed. See *Solem v. Helm*, 463 U.S. 277, 284-86 (1983); *Gregg v. Georgia*, 428 U.S. at 173 (plurality opinion).

Punitive awards imposed pursuant to standardless jury submissions violate the first of these tests because those punishments serve no valid state interest. This Court has already declared that "states have no substantial interest in securing for plaintiffs gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Specifically, neither deterrent nor retributive goals can properly be served by standardless punitive awards.

The theory of deterrence assumes that the person to be deterred will rationally weigh the benefits and costs (including the possible punitive sanctions discounted by the probability of their being imposed) likely to flow from contemplated wrongful conduct. Proper deterrence obtains, therefore, only if actors are informed about the magnitude of the costs, including punishments, that they are likely to incur if they engage in that conduct. When juries are allowed to award punitive damages pursuant to laws that establish no standards, the actor contemplating wrongful conduct can only guess at the likely consequences.

Proper deterrence also requires that punishment be imposed in the amount, and only in the amount, needed to ensure that the actor's expected costs (that is, actual costs adjusted upward to account for the probability that the conduct will not be detected and successfully prosecuted by injured persons), including punishments, equal

any wrongful gain that he would otherwise expect to obtain from the wrongful conduct. See H. Packer, *The Limits of the Criminal Sanction* 45-48 (1968). Any other punishment will either overdeter or underdeter. Therefore, if punishments actually imposed have not been required to reflect this limitation, the punished defendants and other actors will see the absence of the required relationship and will be either overdeterred or underdeterred in the future.

Punitive awards imposed pursuant to standardless jury submissions also fail to serve the state's retributive purposes. The basic test of the propriety of a punishment as retribution is that the punishment must be proportionate to the wrongdoing. See Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 846 (1972). This is also the second test for excessiveness of punishments articulated by this Court. See p. 10, *supra*. Punitive damages imposed pursuant to standardless jury submissions violate the proportionality requirement in two respects.

First, the punitive award imposed in a particular case for a particular act will be disproportionate if it is not approximately the same as the punitive awards imposed in other instances for similar acts. If there is no specified maximum of any kind on punitive damages awards, and if juries are not told what other punitive awards have been imposed for similar acts and that their award should not substantially differ, there is nothing to ensure that punishments imposed for different instances of identical conduct will be approximately equal. Disproportionality will result. And so it has.

Second, punishment imposed for one form of wrongdoing will not be properly proportioned unless it is less severe than the punishments imposed for more serious forms of wrongdoing and is more severe than the punishments imposed for less serious forms of wrongdoing. Again, however, if proportioned maxima have not been

established beforehand to limit juries' awards for various forms of wrongdoing, and if juries are not also instructed as to what punishments have been imposed for different forms of wrongdoing and that the punishment they impose must be appropriately proportioned, the relationships between punishments and wrongful acts from case to case will be purely fortuitous. Disproportionality will necessarily result. Again, it has.

Neither of these problems infects criminal sentencing or civil fines in the manner that these problems infect jury-imposed discretionary punitive damages awards. Legislatures in every state establish maximum criminal fines, prison terms, and civil fines and thereby establish proportionality between punishments and wrongs in advance. In addition, the judges who impose criminal sentences and civil fines are aware of and are bound by the legislatively established proportions. The judges also do not impose a sentence or fine in one case without the benefit of knowing what sentences or fines have been imposed in both similar and dissimilar cases.

Juries imposing discretionary punitive damages have none of these guides or restraints. They exercise uninformed license based on the emotion of the case before them.

In sum, where, as here, punitive damages are imposed pursuant to a state law that specifies no maximum level, no required relationship to the harm caused, no required relationship to the punishments for other acts of wrongdoing, and no other objective standard, there is an urgent need to require the state to "replac[e] arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing [punishment]." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (capital punishment case). This Court should review the prevailing state laws to determine whether the Eighth Amendment requires as much.

**B. Review by This Court of Punitive Damages That Are Awarded Pursuant to Standardless Jury Submissions and That Exceed Every Legislatively Established Maximum for Conduct That Is Reasonably Comparable Is Especially Needed.**

One method for reviewing the appropriateness of a *particular* punitive damages award for excessiveness under deterrent and retributive principles is to compare the size of the punitive award to specific civil and criminal monetary punishments that the same jurisdiction and other jurisdictions have statutorily specified for similar conduct. In particular, the punitive damages award can be compared to specific punitive damages awards—for example, a fixed dollar maximum or a fixed maximum multiple of compensatory damages—authorized by the same state's legislature for specific other forms of conduct; to the specific punitive awards established by other legislatures for the identical conduct; to the legislatively established maximum fines for a variety of criminal acts in the same state; and even to other punitive damages awards previously imposed in the same state.

Here, for example, the four charts attached as Appendices "A" through "D" to this brief demonstrate that the punitive damages award of \$6 million in this case greatly exceeds every one of those guidelines. Appendix "A" shows that the Vermont Legislature has established specific maximum punitive damages sums—specific dollar sums, specific multiples of compensatory awards, or other specific measures, such as the plaintiff's attorneys' fees—for a wide variety of wrongful conduct. The punitive award here is more than 100 times larger than the compensatory damages; yet the largest multiple that the Vermont Legislature has specifically provided for is a punitive award ten times the sum wrongfully obtained by the defendants. The wide variety of conduct for which specific punitive awards are designated, together with the variety of types of specified punitive awards, also dem-



onstrates that the Vermont Legislature can readily establish civil punishments that reflect that legislature's judgment about proper proportionality. There appears to be no good reason why that legislature has made no effort to extend such an effort to other categories of wrongful conduct, including antitrust violations.

Similarly, Appendix "B" shows that the Vermont Legislature has established a wide variety of specific civil fines for a wide variety of specific wrongful conduct. None of those civil fines, for conduct ranging from various fraudulent actions to improper uses of radioactive material, even begins to approach the magnitude of the punitive damages award in this case, either in dollar amount or as a multiple of the harm caused. The punitive award in this case is some 300 times larger than the largest civil fine for which a dollar maximum is specified.

Appendix "C" lists a wide variety of the legislatively established criminal fines in the State of Vermont. The punitive damages award in this case exceeds by millions of dollars, and by a multiple of more than 200, any specified fine for any nonviolent crime in the State of Vermont.

Appendix "D" shows that the punitive damages award in this case also vastly exceeds the legislatively specified maximum punitive damages for predatory pricing activity in every one of the forty-three states that specifies a measure of punitive damages for antitrust conduct. Every such state has concluded that a punitive award no more than twice the size of the compensatory award, together with the plaintiff's costs and attorneys' fees, is an appropriate deterrent and punishment. Congress, too, reached the same conclusion many decades ago and has found no need to increase the level of civil punishment. See 15 U.S.C. § 15 (1982) (specifying treble damages and reasonable attorneys' fees as the relief awarded to victorious plaintiffs in private antitrust actions). The

punitive award in this case, in contrast, is approximately 100 times larger than the compensatory award.

In sum, the punitive damages award in this case vastly exceeds every legislatively established penalty, civil or criminal, for any form of nonviolent wrongful conduct in the State of Vermont, and every legislatively established punitive damages award for the identical conduct—predatory pricing—in every state in the nation with a specified punitive damages award for that type of conduct. The award also exceeds every reported prior punitive damages award, for every type of conduct, in the history of the State of Vermont. See, e.g., *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 543 A.2d 1320 (Vt. 1988) (punitive damages award of \$300,000 for libel).

This award thus demonstrates the intimate relationship between the evil of excessive or disproportionate punishments and the evil of arbitrary or standardless punishment. If punishments are left to be determined on an *ad hoc* basis in the heat of trial, rather than being determined, or at least limited, by a legislative body considering types of conduct and the relative need for punishing each such type of conduct, excessive punishments like the one in issue here will continue to be commonplace.



# CONCLUSION

The petition for a writ of certiorari should be granted.

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## APPENDICES

November 1, 1988

\* Counsel of Record

## APPENDIX A

SPECIFIED PUNITIVE DAMAGES FOR  
SPECIFIC FORMS OF CONDUCT IN VERMONT

Title and Section in Vermont Statutes Annotated	Description	Specified Punitive Damages
tit. 9, § 2311	Civil remedy for false checks	\$50, in addition to the amount of the check, court costs, bank fees, and attorney's fees
tit. 9, § 2361	Willful violation of motor vehicle financing laws	twice the total of finance charges under a contract made in willful violation of applicable provisions, in addition to reasonable attorneys fees, and the lender shall be barred from recovery of such charges
tit. 9, § 2409	Willful violation of retail installment sales laws	twice the total of the finance charges under a contract made in willful violation of the applicable provisions, in addition to reasonable attorney's fees, and the seller shall be barred from recovery of such charges
tit. 9, § 2461	Consumer fraud	exemplary damages not exceeding three times the value of the consideration given by the consumer
tit. 10, § 6242(c)	Illegal sale of mobile home park	greater of \$10,000 or 50% of gain realized in sale
tit. 10, § 6615(b)	Failure timely to comply with court order requiring removal of hazardous waste	three times the cost of removal
tit. 12, § 2152	Taking illegal costs or fees	ten times the excess

**APPENDIX B**  
**CIVIL FINES IN VERMONT**

Title and Section in Vermont Statutes Annotated	Description	Civil Fine
tit. 1, § 618	Alteration of banks or bed of Connecticut river	not more than \$5,000
tit. 2, § 255	Failure to register as a lobbyist	not more than \$500
tit. 3, § 809a	Failure to comply with subpoena issued by agency	not to exceed \$100
tit. 3, § 2822(c)(4)	Violation of order of court under Environ- mental Conservation subsection	not less than \$100 and not more than \$10,000 for each violation
tit. 4, § 492	Willful failure by jus- tice to deposit oath with town clerk	not more than \$100
tit. 4, § 958	Nonappearance of juror	\$50
tit. 4, § 961	Willful misrepresenta- tion on jury question- naire	not more than \$50
tit. 5, § 65	Failure to pay tax to finance transportation board and agency of transportation	5% of tax not paid or \$10, whichever is greater, if tax is paid within 15 days after due; otherwise, 25% or \$50, whichever is great- er; if fraudulent return is filed, 50% of amount due or \$20, whichever is greater
tit. 5, § 1819	Granting or knowingly consenting to special re- bate or transportation rate	officer or employee: not less than \$100 and not more than \$1,000 company: not less than \$500 and not more than \$5,000

Title and Section in Vermont Statutes Annotated	Description	Civil Fine
tit. 5, § 2003	Transportation of radio- active materials	up to \$10,000 per day of violation
tit. 8, § 72(b)	Failure or refusal to produce documents or testify before banking and insurance commis- sioner	not more than \$1,000 per day of failure or re- fusal and six months suspension of authority to do business
tit. 8, § 558	Unlawfully doing busi- ness as or using names "bank," "banking associ- ation," "trust company"	not more than \$500 per offense
tit. 8, § 1063	Violation of interstate banking rules	not less than \$1,000 nor more than \$10,000 per day
tit. 8, § 3662	Issuance of insurance policy following suspen- sion of right to carry on insurance business	not more than \$2,000 per policy
tit. 8, § 3368(c)	Transaction of insur- ance business without certificate of authority from commissioner	not less than \$50 nor more than \$1,000 per offense
tit. 8, § 3626	Advertising existence of insurance association for purpose of sale or solicitation of insurance	not more than \$250 per offense
tit. 8, § 3661(2)	Violation of or non- compliance with insur- ance law requirements	not more than \$2,000
tit. 8, § 3703	Discrimination in life insurance premiums charged, or related spe- cial favors or induce- ments	not more than \$500
tit. 8, § 3861	Discrimination in fire and casualty insurance premiums charged, or related special favors or inducements	not more than \$500



Title and Section in Vermont Statutes Annotated	Description	Civil Fine
tit. 21, § 210	Labor safety	Up to \$20,000 for each employer who seriously or willfully violates, or for each employer who repeatedly violates, the Code or any rule, order, or regulation promulgated pursuant thereto
tit. 21, § 254	Fire safety & prevention	Up to \$1,000 for each violation, and not more than \$2,000 plus \$100/day for each failure to comply with any emergency order
tit. 8, § 4726	Unfair or deceptive insurance practices	not more than \$500
tit. 9, § 2461	Injunction of prohibited acts of consumer fraud	not more than \$10,000 for each violation of the injunction
tit. 10, § 563(b)	Violation of confidentiality of air pollution records	not more than \$100
tit. 10, § 555(c)	Violation of emissions reporting requirements	not more than \$100 per day
tit. 10, § 568	Violation of air pollution control laws generally	not more than \$2,000
tit. 10, § 1025(a)	Violation of alteration of stream flow laws generally	not more than \$10,000 per day
tit. 10, § 6612(b)	Violation of laws governing hazardous waste management	not more than \$10,000 per day
tit. 12, § 1623	Penalty for disobeying subpoena	not exceeding \$100 plus all cost of litigation incurred as a result of noncompliance
tit. 12, § 4916	Penalty when guilty of forcible entry or detainer	fine not exceeding \$10

Title and Section in Vermont Statutes Annotated	Description	Civil Fine
tit. 14, § 105	Custodian or executor of will refuses to deliver or accept will or trust	\$10 for each month duty is neglected
tit. 18, § 130(6)	Violation of public health hazard provisions	not to exceed \$10,000 for each violation
tit. 32, § 7482(b)	Fraudulent failure to file tax return (estate and gift taxes)	\$25 for each month before proper return filed
tit. 32, § 7777(b)	Failure to pay assessment of tax deficiency by wholesale or retail dealer (cigarettes and tobacco products)	5% of assessment, for each month not paid in full, but not to exceed 25% of assessment
tit. 32, § 8147	Corporate officer makes false statement in tax return sworn to in another state (corporation taxes)	\$300
tit. 32, § 8910	Purchaser of motor vehicle willfully makes false statement on tax form furnished by commissioner (motor vehicle purchase and use tax)	not more than \$500

## APPENDIX C

## CRIMINAL FINES IN VERMONT

Title and Section of Vermont Statutes Annotated Code	Description	Fine
tit. 9, § 4238	Securities law violations	not more than \$10,000
tit. 9, § 4507	Discriminatory or unfair operation of public accommodations or housing practices	not more than \$1,000
tit. 10, § 1935(a)	Violation of laws governing underground storage tanks generally	not more than \$25,000
tit. 10, § 6612(a)	Violation of laws governing hazardous waste management	not more than \$25,000 per day
tit. 11, § 1031	Making of false statements by officers or directors concerning issuance of stock in business cooperative	not more than \$5,000
tit. 11, § 2204	Filing of false articles, statements, reports, etc., by directors and officers	not more than \$500
tit. 11, § 2754	Filing of false statements, articles reports, etc. by directors and officers of non-profit corporation.	not more than \$100
tit. 13, § 1101	Bribing public officers or employees	not more than \$5,000 if gift is less than \$500; not more than \$10,000 if gift is \$500 or more
tit. 13, § 1102	Public officers or employees accepting bribes	same as § 1101
tit. 13, § 1103	Bribing trier of causes	not more than \$1,000
tit. 13, § 1104	Trier of causes accepting bribes	not more than \$1,000
tit. 13, § 1105	Public Service Board members not to accept pay except from state	not more than \$1,000

Title and Section of Vermont Statutes Annotated Code	Description	Fine
tit. 13, § 1106	Demanding kickbacks for purchasing supplies	not more than \$5,000 if kickback is less than \$500; not more than \$10,000 if kickback is \$500 or more
tit. 13, § 1107	Demanding kickbacks for license	same as § 1106
tit. 13, § 1108	Demanding kickbacks as agent of private corporation	same as § 1106
tit. 13, § 1801	Forgery and counterfeiting documents	not more than \$1,000
tit. 13, § 1802	Uttering a forged instrument	not more than \$1,000
tit. 13, § 1804	Counterfeiting paper money	not more than \$1,000
tit. 13, § 1806	Affixing false signature to obligation of corporation	not more than \$1,000
tit. 13, § 2005	False advertising	not more than \$1,000
tit. 13, § 2006	False statement as to financial ability	not more than \$1,000
tit. 13, § 2022	Bad checks	not more than \$1,000, plus restitution of amount of check, and \$5 service fee
tit. 13, § 2531	Embezzlement generally	not more than \$500
tit. 13, § 2532	Embezzlement by officer or servant of incorporated bank	not more than \$1,000
tit. 13, § 2533	Embezzlement by receiver or trustee	not more than \$1,000
tit. 13, § 2534	Embezzlement by executor or administrator	not more than \$1,000
tit. 13, § 2535	Embezzlement by guardian	not more than \$1,000

Title and Section of Vermont Statutes Annotated Code	Description	Fine
tit. 13, § 2582	Theft of services	not more than \$1,000 if the value of the services is \$500 or less; not more than \$5,000 if the value of the services is more than \$500
tit. 13, § 2901	Perjury and subornation of perjury	not more than \$10,000
tit. 32, § 10010(a) and (b)	Willful evasion of tax	Not more than \$10,000 or 5 times the amount of the tax defeated or evaded, whichever is larger
tit. 32, § 10105(a)	Willful failure to pay tax liability by generator	Fine of not more than \$5,000

## APPENDIX D

## STATE ANTITRUST PRIVATE REMEDIES

STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
Alabama	Ala. Code § 6-5-60 (1977)	all actual damages plus \$500 in each instance of injury or damage
Alaska	Alaska Stat. § 45.50 576 (1986)	treble damages for willful violations, plus costs of suit, including reasonable attorney's fees
Arizona	Ariz. Rev. Stat. Ann. § 44-1408 (1987)	up to three times the damages sustained, plus taxable costs and reasonable attorney's fees
California	Cal. Bus. Prof. Code § 16750 (West Supp. 1988)	treble damages, interest from the date of service of the complaint, reasonable attorney's fees, and costs of suit
Colorado	Colo. Rev. Stat. § 6-2-111 (1973)	treble damages for unfair practices in violation of sections 6-2-103 to 6-2-108 or 6-2-110 (discriminatory sales, secret rebates, and sales below cost)
Connecticut	Conn. Gen. Stat. § 35-35 (1987)	treble damages, reasonable attorney's fees, and costs
Florida	Fla. Stat. § 542.22 (1988)	treble damages and costs of suit, including reasonable attorney's fees
Hawaii	Haw. Rev. Stat. § 480-13 (Supp. 1987)	treble damages or \$1,000, whichever is greater, and reasonable attorney's fees, together with costs of suit
Idaho	Idaho Code § 48-114 (1977)	treble damages and costs of suit, including reasonable attorney's fees



STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
Illinois	Ill. Rev. Stat. ch. 38, para. 60-7 (1987)	treble damages for violations of subsections 3(1) or 3(4) of Antitrust Act, Ill. Rev. Stat. ch. 38, para. 60-3, or, at the court's discretion, for willful violation of subsections 3(2) or 3(3), together with costs and reasonable attorney's fees
Indiana	Ind. Code § 24-1-2-7 (1982)	treble damages together with the costs of suit, including reasonable attorney's fees
Iowa	Iowa Code § 553.12 (1987)	actual damages and reasonable attorney's fees, plus, at the court's discretion, exemplary damages that do not exceed twice the amount of actual damages
Kansas	Kan. Stat. Ann. § 50-801 (1983)	treble damages, plus reasonable attorney's fees and costs
Kentucky	Ky. Rev. Stat. Ann. § 365.070 (Michie 1987)	treble damages (discriminatory sales, sales below cost, and unfair trade practices)
Louisiana	La. Rev. Stat. Ann. § 51:137	treble damages, costs of suit, and reasonable attorney's fees
Maine	Me. Rev. Stat. Ann. tit. 10, § 1104 (Supp. 1987)	treble damages, costs of suit, including necessary and reasonable investigative costs, reasonable experts' fees, and reasonable attorney's fees
Maryland	Md. Com. Law Ann. § 11-209(b)(4) (1983)	treble damages, costs, and reasonable attorney's fees

STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
Massachusetts	Mass. Gen. L. ch. 93, § 12 (1984)	up to three times the amount of actual damages caused by violations committed with malicious intent to injure, together, with costs of suit, including reasonable attorney's fees
Michigan	Mich. Comp. Laws § 445.778 (Supp. 1988)	up to three times actual damages caused by a flagrant violation, plus interest on the damages from the date of the complaint, taxable costs, and reasonable attorney's fees
Minnesota	Minn. Stat. § 325D.57 (1986)	treble damages, together with costs and disbursements, including reasonable attorney's fees
Mississippi	Miss. Code Ann. § 75-21-9 (1972)	all damages, plus \$500 in each instance of injury
Missouri	Mo. Rev. Stat. § 416.121 (1979)	treble damages, reasonable attorney's fees, and the costs of suit
Montana	Mont. Code Ann. § 30-14-222	treble damages
Nebraska	Neb. Rev. Stat. § 59-821 (1984)	actual damages or liquidated damages and costs of suit, including reasonable attorney's fees
Nevada	Nev. Rev. Stat. § 598A.210 (1987)	treble damages, reasonable attorney's fees, and costs
New Hampshire	N.H. Rev. Stat. Ann. § 356:11 (1984)	up to three times the actual damages, if the violation is willful or flagrant, plus costs of the suit and reasonable attorney's fees

STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
New Jersey	N.J. Rev. Stat. § 56:9-12 (Supp. 1988)	treble damages, reasonable attorney's fees, filing fees, and reasonable costs of suit, including, but not limited to, the expenses of discovery and document reproduction
New Mexico	N.M. Stat. Ann. § 57-1-3 (1987)	up to three times actual damages, and costs and attorney's fees
New York	N.Y. Gen. Bus. Law § 340 (McKinney 1988)	treble damages, costs not exceeding ten thousand dollars, and reasonable attorney's fees
North Carolina	N.C. Gen. Stat. § 75-16 and 75-16-1 (1987)	treble damages, and attorney's fees in selected instances
North Dakota	N.D. Century Code § 51-08.1-08	up to three times the damages sustained, if the violation is flagrant, taxable costs and attorney's fees
Ohio	Ohio Rev. Code Ann. § 1331.08 (Baldwin 1987)	double damages and costs of suit
Oklahoma	Okla. Stat. tit. 79, § 25 (1987)	treble damages, costs of suit, and reasonable attorney's fees
Oregon	Or. Rev. Stat. § 646.780 (1987)	treble damages and costs of suit, including necessary reasonable investigative costs and reasonable experts' fees, and reasonable attorney's fees at trial
Rhode Island	R.I. Gen. Laws § 6-36-11(a) (1956)	treble damages, reasonable costs of suit, including, but not limited to, the expenses of discovery and document reproduction, and reasonable attorney's fees

STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
South Carolina	S.C. Code Ann. § 39-5-140 (Law Co-op 1985)	treble damages, reasonable attorney's fees and costs for willful or knowing use of unfair competitive methods
South Dakota	S.D. Codified Laws Ann. § 37-1-14.3 (1986)	treble damages, taxable costs, and reasonable attorney's fees
Texas	Tex. Bus. & Comm. Code § 15.21 (Vernon 1987)	actual damages, plus interest from the date of service of the complaint, or treble damages, if the conduct was willful or flagrant, and costs of suit, including reasonable attorney's fees
Utah	Utah Code Ann. § 76-10-919(1) (Supp. 1987)	treble damages, costs of suit, and reasonable attorney's fees
Virginia	Va. Code Ann. § 59.1-9.12 (1987)	up to three times the actual damages, if the violation was willful or flagrant, costs of suit and reasonable attorney's fees
Washington	Wash. Rev. Code § 19.86.090	up to three times the actual damages, in the court's discretion, together with costs of suit, including reasonable attorney's fees
West Virginia	W. Va. Code § 47-18-9 (1986)	treble damages, attorney's fees, and reasonable costs
Wisconsin	Wis. Stat. § 133.18 (Supp. 1988)	treble damages, costs of suit, and reasonable attorney's fees

**AMICUS CURIAE**

**BRIEF**



**In the Supreme Court of the United States**

OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. AND  
BROWNING-FERRIS INDUSTRIES, INC., PETITIONERS

v.

KELCO DISPOSAL, INC. AND JOSEPH KELLEY, RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

BRIEF AMICI CURIAE OF ARTHUR ANDERSEN & CO.,  
ARTHUR YOUNG & COMPANY, COOPERS & LYBRAND,  
DELOITTE, HASKINS & SELLS, ERNST & WHINNEY,  
PEAT MARWICK MAIN & CO., PRICE WATERHOUSE,  
AND TOUCHE ROSS & COMPANY  
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January 19, 1989

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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No. 88-556

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BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. AND  
BROWNING-FERRIS INDUSTRIES, INC., PETITIONERS

*v.*

KELCO DISPOSAL, INC. AND JOSEPH KELLEY, RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

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BRIEF AMICI CURIAE OF ARTHUR ANDERSEN & CO.,  
ARTHUR YOUNG & COMPANY, COOPERS & LYBRAND,  
DELOITTE, HASKINS & SELLS, ERNST & WHINNEY,  
PEAT MARWICK MAIN & CO., PRICE WATERHOUSE,  
AND TOUCHE ROSS & COMPANY  
IN SUPPORT OF PETITIONERS

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**INTEREST OF THE AMICI CURIAE**

With the consent of the parties pursuant to Rule 36 of the Rules of this Court, the amici curiae submit this brief in support of petitioners.<sup>1</sup>

The amici curiae are firms engaged in the practice of the profession of accounting and auditing. They believe

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<sup>1</sup> The parties' letters of consent have been previously filed with the Clerk of this Court.

they are the eight largest firms practicing this profession in the United States, reporting, collectively, on the financial statements of over 90 percent of those companies whose securities are publicly traded in the United States. The amici, which are organized as partnerships, are collectively composed of nearly 9,000 partners and over 80,000 other professional employees, and practice in some 800 offices throughout the United States.

Congress has determined in the Securities Act of 1933 and the Securities Exchange Act of 1934 that the work of the public accountant is indispensable to the fair and efficient disclosure of information in American capital markets. By law, all public companies whose securities are registered with the Securities and Exchange Commission must have their financial statements examined by public accountants. See 15 U.S.C. § 77aa (Schedule A) (25)-(27) (registration statements required by the Securities Act for public offerings must contain financial statements that have been examined by a public accountant); *id.* at § 78l(b)(1)(J)-(K) (same for registration under the Exchange Act of any security to be traded on an exchange). Congress thus long ago concluded that independent public accountants perform an important public service.

Amici have in recent years become "institutional defendants" in the courts—organizations that "institutionally" (that is, chronically) are targeted by plaintiffs as the "deep pocket" in various types of commercial tort litigation. Specifically, amici have witnessed a dramatic increase in the number of state and federal law claims filed against them, ostensibly based on their rendition of professional services. Four times as many such claims were filed against amici in 1988 as were filed in 1981.<sup>2</sup>

<sup>2</sup> There is nothing to suggest that this increase is related in any way to a decline in the quality of professional services rendered by independent auditors. Cf. Fischel, *The Regulation of Accounting: Some Economic Issues*, 52 Brooklyn L. Rev. 1051, 1054 (1987).

Amici are concerned that this increase in exposure to litigation may cause them difficulty in attracting and retaining the most qualified of professional personnel. See Note, *Detecting and Preventing Financial Statement Fraud: The Roles of the Reporting Company and the Independent Auditor*, 5 Yale L. & Pol'y Rev. 514, 526 (1987) (accounting profession is "finding it increasingly difficult to attract quality personnel").

The law suits filed against amici often contain a request for punitive damages. The mere presence of a prayer for punitive damages, whether or not they are ultimately awarded, can be a factor in litigation strategies that potentially warps the fair consideration of whatever underlying merits the claim may possess. As such, the punitive damage claim is a classic instance of a plaintiff's *in terrorem* litigation tactic, by which a law suit may be endowed with "a settlement value to the plaintiff out of any proportion to its prospect of success at trial" (*Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975)).

Because of the substantial impact of even the threat of punitive damages on a profession whose activities Congress has found to be in the public interest, amici believe that their views on the question of constitutionally excessive punitive damage awards may be of assistance to the Court's consideration of this case.

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("Unless there is some amazing coincidence whereby a high percentage of wrongdoers wind up in particular industries, \* \* \* it is implausible that the problems of an entire industry are attributable to disclosure decisions by firms and their accountants."). Instead, amici suggest that they, like much of corporate America, have simply been caught up in the "tort explosion" of recent years. See generally P. Huber, *Liability: The Legal Revolution and Its Consequences* (1988).



## SUMMARY OF ARGUMENT

I. Although both the imposition and the amount of punitive damage awards are matters of local law in the first instance, both are subject to constitutional limitation under the Excessive Fines Clause of the Eighth Amendment. A punitive damage award is unconstitutionally excessive if either in its incidence or its amount it is not rationally related to promotion of the twin purposes of punishment and deterrence that alone justify the imposition of punitive damages. Although the law in many states permits the imposition of vicarious punitive damage liability on firms for the torts of their staff, this Court has held that an award of punitive damages vicariously levied against an innocent person for the tort of another can neither punish nor deter. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267, 268-270 (1981). Therefore, vicarious punitive damage liability results in an unconstitutionally excessive fine when it is imposed on a firm that did not itself engage in the sort of egregious conduct necessary to support an award of punitive damages against the primary tortfeasor.

Large firms of professionals such as amici are especially threatened by excessive punitive damage fines based on vicarious liability for the torts of individuals. The nature of accounting and auditing requires the professional staff handling each client engagement to make a constant stream of decentralized professional judgments addressing the circumstances unique to that client. In this setting, the individual tort of one among thousands of accounting professionals—often attributable to nothing more than an error in accounting judgment easily misconstrued by a jury as “intentional” or “reckless” misconduct—may subject the firm to the threat of vicarious punitive liability for conduct that the firm as an institution neither participated in nor condoned.

The potential for excessiveness latent in vicarious punitive liability is exacerbated by the organization of amici

as professional partnerships, which puts at risk all of the personal assets of each of the partners despite their total lack of complicity in torts committed by isolated individuals. It is difficult to see how this punishment of innocent persons could not transgress constitutional boundaries of excessiveness.

The constitutional limits we propose on the imposition of vicarious punitive liability are in no way undercut by any supposed need to force professional firms to implement quality control measures to attempt to prevent professional misconduct by staff. The accounting profession is already subject to numerous requirements and incentives for quality control, and has in place an extensive system of monitoring and professional education requirements to minimize the possibility of professional error. Amici have spent literally hundreds of millions of dollars in this endeavor, rendering any additional deterrence to be obtained by a rule facilitating the imposition of vicarious punitive awards highly doubtful.

II. The amount of a punitive damage award against a firm or an individual must also satisfy the purposes behind the imposition of punitive damages to avoid running afoul of Eighth Amendment limitations. Although a variety of factors may be constitutionally appropriate to consider in determining the size of a punitive award, neither a simple multiplication of the compensatory damage award nor a simple reference to the size of the defendant should suffice, standing alone, to justify the amount of a punitive award. Multiplication of compensatory damages leads to excessive results when, as with amici, potentially very large compensatory awards—themselves wholly disproportionate to the relatively small gains realized by the wrongdoing—already provide substantial punishment and deterrence. Mere reference to the size of the firm, relied on by the court of appeals in this case, is even less appropriate because, in contravention of this Court’s Eighth Amendment jurisprudence,

it sets the amount of the punitive award by reference to the wrongdoer rather than the wrong. A focus on the actual or expected gain from the wrong would be a more appropriate constitutional benchmark for petitioners, amici, law firms, and other organizations that are charged with economic torts.

## ARGUMENT

### I. PUNITIVE DAMAGES BASED ON UNFETTERED VICARIOUS ORGANIZATIONAL LIABILITY FOR THE TORTIOUS CONDUCT OF A MEMBER OR EMPLOYEE OF A FIRM ARE UNCONSTITUTIONALLY EXCESSIVE

Petitioners' brief and those of other amici explain why, as a threshold matter of history and constitutional interpretation, punitive damage awards are subject to constitutional limitation under the Excessive Fines Clause of the Eighth Amendment. In this brief, amici will assume that this Court has passed that threshold, and will address the issue of the standards by which courts should assess the excessiveness of a punitive damage award that could affect large firms providing professional services. Our focus is slightly different from that of petitioners and many of the amici, who deal almost exclusively with the standards required to ensure that the *quantitative* measurement of punitive damages does not exceed constitutional limits. Although we briefly address that question as well (see pages 22-28, *infra*), we believe it is important, as an initial matter, to consider the *qualitative* standards of conduct necessary to sustain an award of punitive damages (of *any* amount) when the punitive award is sought to be imposed on one other than the primary tortfeasor on a theory of vicarious organizational liability. For clarity and specificity, our analysis focuses primarily on the practice of the accounting profession; however, the analysis we propose applies equally to other professional organizations such as law firms.

### A. An Overview of the Audit Function

At the outset, it may be useful to provide a brief description of the audit function and the ways in which the conduct of that activity may lead to exposure to tort liability. Cf. R. Gormley, *The Law of Accountants and Auditors* §§ 1.06, 1.07 (1981) (noting common misperceptions among the general public concerning the role of the independent auditor).

Stated simply, independent audits are conducted for the purpose of issuing an opinion whether, in the auditor's professional judgment, a corporation's financial position and results of operations have been fairly presented in all material respects in the financial statements issued by management. Because the organization and precise line of business of each client is different, the audit designed for each client can be viewed as essentially a unique product. And because of the size and complexity of the companies audited by amici, designing and conducting an audit is neither a simple nor a mechanical process. A major corporation engages in literally millions of financial transactions each year, and it obviously would be prohibitively expensive for the client to have the outside auditor review even a substantial portion of those transactions.<sup>3</sup>

Thus, the first step in the audit process is to establish the scope of the audit. This requires the auditor to develop a reasonable sampling of transactions to be reviewed and to identify those areas in which there is the greatest likelihood of client error or misrepresentation. Deciding on the scope of the audit is therefore a highly subjective and judgmental task, requiring, *inter alia*,

<sup>3</sup> An audit is not intended to determine whether each individual account is correct, but whether the financial statements taken as a whole are fairly presented in all material respects in accordance with generally accepted accounting principles (GAAP). See AICPA, *Professional Standards*, Statements on Auditing Standards No. 1, § 150.02.

the development of substantial familiarity with the client's operations and an understanding of the client's internal financial controls. Because of the nationwide scope of amici's operations, these tasks must generally be performed on a decentralized basis by the partners and professional staff in amici's offices around the country. In most circumstances, therefore, only the local audit team itself will have detailed knowledge of the conduct of a specific audit.

Having decided on the initial scope of the audit, the auditor must next test the client's internal financial controls insofar as he plans to rely on those controls in the conduct of the audit. If those tests confirm the general reliability of the controls, the auditor may conclude that the extent of his substantive audit tests may be reduced. If, on the other hand, the tests prove the controls unreliable, the auditor may have to alter the initial scope of the audit and build more substantive tests into the process. The audit culminates with a thorough review of the evidential matter obtained during the sampling and testing phases; that review enables the auditor to express his ultimate opinion on the question whether the client's financial statements fairly present the company's financial position and results of operations in all material respects in accordance with generally accepted accounting principles (GAAP).

Regardless of the extent of the auditor's activities, however, the client and its management bear the responsibility for the accuracy and adequacy of the client's financial statements. See, e.g., *In re Interstate Hosiery Mills, Inc.*, 4 S.E.C. 706, 721 (1939); *Accounting Series Release* (ASR) No. 62 (1947), Fed. Sec. L. Rep. (CCH) ¶72,081; ASR No. 126 (1972), Fed. Sec. L. Rep. (CCH) ¶72,148; Gormley, *supra*, at 1-22 to 1-23 & nn.47-48; AICPA, *Professional Standards, Statements on Auditing Standards* No. 1, § 110.02. As the SEC explained in *Interstate Hosiery Mills*, 4 S.E.C. at 721:

The fundamental and primary responsibility for the accuracy of information filed with the Commission and disseminated among the investors rests upon management. Management does not discharge its obligations in this respect by the employment of independent public accountants, however reputable. Accountants' certificates are required not as a substitute for management's accounting of its stewardship, but as a check upon that accounting.

Much of the recent spate of litigation against independent auditors may be traced to the public's failure to appreciate the fundamental distinction between management's preparation of and ultimate responsibility for its financial statements and the auditor's more limited responsibility to examine and report on those statements in good faith and with reasonable competence in accordance with the standards of his profession. In conducting his examination and rendering his opinion on management's financial statements taken as a whole, an auditor neither agrees to protect against every error, mistake, or dishonesty, nor guarantees that his decisions are correct. See, e.g., *SEC v. Arthur Young & Co.*, 590 F.2d 785, 788 (9th Cir. 1979) (an auditor "is not a guarantor of the reports he prepares and is only duty bound to act honestly, in good faith and with reasonable care in the discharge of his professional obligations").

Against this backdrop, we now turn to an examination of the inherent constitutional infirmities in assessments of vicarious punitive liability against large professional service firms.

## B. The Rationale for Punitive Damages

It is by now well settled that the only legitimate purposes of punitive damages are punishment and deterrence. As this Court has explained, punitive damages "by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him



and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981) (emphasis added). See also *Smith v. Wade*, 461 U.S. 30, 49 (1983); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). These twin purposes of punishment and deterrence define the constitutional inquiry into excessiveness under the Eighth Amendment. One does not "punish" by visiting punitive damages on "blameless or unknowing" persons who "took no part in the commission of the tort." *City of Newport*, 453 U.S. at 267. Similarly, one does not "deter" by fixing punitive liability on a person who is incapable of altering his conduct to prevent "similar extreme conduct." See *id.* at 267, 268-270. See also *Lake Shore & M.S. Ry. v. Prentice*, 147 U.S. 101 (1893) (holding for like reasons that under general common law a principal may not be liable for punitive damages due to the tort of its agent unless the principal authorized, ratified, or participated in the tort). In light of these principles, we submit that a punitive damage award against a large professional firm based on nothing more than vicarious liability for tortious conduct by the individuals involved in a particular engagement conflicts with the underlying rationale for punitive damages and would, "by definition," constitute an excessive fine under the Eighth Amendment. Cf. *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (where death penalty does not "measurably contribute[]" to punishment or deterrence, it becomes an unconstitutional "purposeless and needless" punishment).

### C. Vicarious Punitive Damage Liability at Common Law

To understand why the Eighth Amendment prohibits the imposition of unfettered vicarious liability for punitive damages, one must begin with the state law rules under which a firm may be held vicariously liable for

punitive damages due to the tort of a member of its staff. In general, the rules in the various states governing the circumstances in which a jury may hold an actor liable for punitive damages based on his own conduct are confused, if not altogether incoherent. See Note, *The Publicly Held Corporation and the Insurability of Punitive Damages*, 53 Fordham L. Rev. 1383, 1397 (1985) ("Each jurisdiction, and sometimes it seems each judge, determines the type of behavior warranting [a punitive] award."); Comment, *Punitive Damages Insurance: Why Some Courts Take the Smart Out of "Smart Money"*, 40 U. Miami L. Rev. 979, 989 (1986) (minimum standard of culpable conduct for punitive award "has been anything but standard"). To an even larger extent, the same is true of the rules by which one may be held vicariously liable for punitive damages based on the conduct of another. Indeed, the degree of confusion about the rules for vicarious punitive liability is so great that commentators are unable to agree upon what rules the states actually employ. Compare J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* § 24.01, at 2 (1985), with W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton On Torts* § 2, at 13 (5th ed. 1984) (each pronouncing opposite "majority" rules for vicarious punitive liability). But ironically, the one statement one may make with certainty is that those rules render it far easier to impose vicarious liability for punitive damages on a firm for the torts of its personnel than to impose punitive damages on a primary tortfeasor himself.

Roughly speaking (and bearing in mind the impossibility of neat formulations), punitive liability may not be imposed directly on an individual absent the intentional or reckless commission of a civil wrong. See *Smith v. Wade*, 461 U.S. at 46-48; Restatement (Second) of Torts § 908; *Prosser & Keeton on Torts* § 2, at 9-10; K. Redden, *Punitive Damages* §§ 2.1, 3.1(A) (1980). See also Cal. Civ. Code § 3294 (1987) (requiring for punitive

liability either "intentional" misconduct or misconduct both "despicable" and "conscious" or "willful").<sup>4</sup>

In contrast, juries in many jurisdictions may impose punitive damages on a firm simply for the tort of a person in a managerial position acting within the scope of his duties, even if the firm was altogether prudent in its hiring and supervision of that person. See, e.g., *Protectus Alpha Navig. Co. v. North Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1385-1387 (9th Cir. 1985) (admiralty); *Hatrock v. Edward D. Jones & Co.*, 750 F.2d 767, 771-772, 773 n.3 (9th Cir. 1984) (Idaho law); *Purvis v. Prattco, Inc.*, 595 S.W.2d 103 (Tex. 1980); Restatement (Second) of Torts § 909(c). Other jurisdictions employ a still more expansive test by allowing vicarious punitive liability for the tort of any individual associated with a firm, whether or not in a "managerial" capacity. See, e.g., *Delahanty v. First Pennsylvania Bank, N.A.*, 464 A.2d 1243, 1264-1265 (Pa. Super. 1983); *Embrey v. Holly*, 442 A.2d 966, 969-971 & n.6 (Md. 1982) (stating that this is the majority rule); *Stroud v. Denny's Restaurant, Inc.*, 532 P.2d 790 (Ore. 1975) (same).<sup>5</sup> The upshot is that in most jurisdictions a firm may be ostensibly "punished" and "deterred" through vicarious punitive damage liability despite the total absence of

<sup>4</sup> A few jurisdictions hold that gross negligence may suffice for the imposition of direct punitive liability. See, e.g., *Wooderson v. Ortho Pharmaceutical Corp.*, 681 P.2d 1038, 1061 (Kan.), cert. denied, 469 U.S. 965 (1984); *Mullins v. Ward*, 712 P.2d 55, 63 n.22 (Okla. 1985); *J.J. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 516 N.E.2d 260, 263 (Ill. 1987).

<sup>5</sup> In practice, the difference between these two standards for vicarious liability may be of little importance, because the courts appear willing to bestow "managerial" status on a wide variety of employees. See, e.g., *Hatrock*, 750 F.2d at 771-772 (punitive damages against brokerage partnership affirmed based on stock broker's intentional misrepresentation and churning of customer account because broker was one of more than 500 "managerial" brokers managing themselves in single-broker branch offices).

tortious conduct on the part of the firm itself and despite the firm's inability, as a practical matter, to prevent the commission of the underlying tort.<sup>6</sup>

Not surprisingly, such harsh yet porous rules offer virtually no protection against the unfettered imposition of vicarious punitive liability. In our submission, a vicarious punitive award against a firm under the state law standards outlined above is unconstitutionally excessive if the firm did not itself engage in the sort of egregious conduct necessary to support an award of punitive damages against the primary tortfeasor. In the absence of such conduct, a jury awarding punitive damages against a firm that is only vicariously liable will be meting out a fine that, "by definition," neither punishes nor deters culpable behavior; the award thus becomes a wholly gratuitous punishment of innocent persons—the most extreme sort of "excessive fine."<sup>7</sup>

<sup>6</sup> Some jurisdictions expressly agree with the common law analysis employed by this Court in *Prentice*, and refuse to permit vicarious punitive liability unless the firm authorized, ratified, or participated in the underlying tortious conduct. See, e.g., *Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986, 992 (D.C. 1980); *Samedan Oil Corp. v. Neeld*, 577 P.2d 1245, 1247-1249 (N.M. 1978).

<sup>7</sup> As is obvious from this Court's discussion in *City of Newport*, nothing in our analysis impugns the general rule of *respondent superior* for compensatory tort liability. This is because "whereas the purpose of compensatory damages—compensation of the victim—is accomplished whether payment comes from the master or his misbehaving servant, that of punitive damages—to punish the wrongdoer and deter him and others from duplicating his misconduct—is not. Unless the employer is himself guilty of some tortious act (or omission) because his employee has misbehaved, an award punishing the employer and deterring him and others situated to act likewise (i.e., other employers) makes no sense at all." *Williams v. City of New York*, 508 F.2d 356, 360 (2d Cir. 1974); accord *Prentice*, 147 U.S. at 107 (principal is not vicariously liable for punitive damages under general common law although "of course" principal is vicariously liable for compensatory damages).



**D. The Organization and Activities of Large Accounting Firms Graphically Illustrate the Danger of Unconstitutionally Excessive Fines Imposed on the Basis of Vicarious Liability**

Clients and the public rely on independent auditors for the exercise of disinterested professional judgment in the examination of client financial statements. To fulfill that expectation, amici have become the very large and complex professional organizations already described; as a matter of necessity, large corporations require large accounting firms to undertake the massive task of auditing their financial statements. Importantly, however, the size of firms such as amici permits them to maintain a highly diversified client base that serves to enhance audit quality and the maintenance of professional independence from even the largest of their clients. See Fischel, *The Regulation of Accounting: Some Economic Issues*, 52 Brooklyn L. Rev. 1051, 1052-1053 (1987); Ricardo-Campbell, *Comments on the Structure of Ownership and the Theory of the Firm*, 26 J.L. Econ. 391, 392 (1983).

In addition, public accounting, like law, is a profession in which the needs of clients are met through the judgment and personal services of a team of professionals. Contrary to the common belief of the public—and of juries—the work of an accountant is not at all mechanical. “Instead, modern audits of complex enterprises require accountants to make numerous judgments about the proper characterizations of the data and the reliability of the client’s accounting systems.” Siliciano, *Negligent Accounting and the Limits of Instrumental Tort Reform*, 86 Mich L. Rev. 1929, 1962 n.158 (1988). Because familiarity with the details of the client’s business and transactions is integral to these daily judgments, they must generally be made on a decentralized basis by the accounting professionals involved in the engagement who have gained that familiarity (see Fama and Jensen, *Agency Problems and Residual Claims*, 26 J.L. Econ. 327,

334 (1983))—often unavoidably “by relatively junior members of the accountant’s field staff.” Siliciano, 86 Mich. L. Rev. at 1962 n.158.<sup>8</sup>

Thus, the size of the organizations necessary for amici to satisfy clients and the public, combined with the unavoidable necessity for discretionary decisions by thousands of professionals practicing throughout the country, makes the threat of unwarranted punitive liability against large public accounting firms especially acute. That threat may become reality in two kinds of situations. First, there is the extremely rare but nonetheless grave occurrence of altogether wayward conduct by an accounting professional due to venal personal motives. A notorious recent example of this type of problem is the exchange of falsifications and bribes between a partner of the accounting firm of Alexander Grant & Co. and E.S.M. Group. See Petition for Writ of Certiorari at 25a-26a in *Peat Marwick Main & Co. v. Tew*, No. 87-1727, cert. denied, 108 S. Ct. 2822 (1988).<sup>9</sup> In general, there is little that accounting firms can do to prevent this sort of conduct, and punitive damages assessed against a firm in such circumstances obviously do not further the purposes of punishment and deterrence. Instead, the appropriate response is to leave it to the discretion of prose-

<sup>8</sup> This situation is exacerbated by the oft forgotten fact that the outside auditor is already one step removed from the financial information he is asked to examine. That information is generated by the client, not the auditor; the auditor simply performs tests to reach an opinion whether the client’s financial statements fairly present its financial position and results of operations. See pages 7-9, *supra*. In short, what the auditor produces is “an opinion about the quality of someone else’s product—the client’s financial statements.” Siliciano, 86 Mich. L. Rev. at 1956 n.137; see *id.* at 1961. The prevention of misjudgments about the quality of client information must inevitably fall short in part precisely because it is the client’s information.

<sup>9</sup> The Grant partner pleaded guilty to criminal charges of larceny and grand theft brought against him by the State of Ohio for his role in the E.S.M. fraud.



cutors to decide whether to invoke the criminal justice system if the prosecutor believes there exists evidence of criminal wrongdoing.<sup>10</sup> In that way, effective punishment and deterrence can be meted out against those actually responsible for the wrongdoing.

A second problem facing firms such as amici, which is much more frequent if less melodramatic than the first, arises from the fact that juries not only erroneously believe that the work of accountants is mechanical, but often tend to assume that a diligent, careful accountant should never make a mistake in his work. Indeed, juries sometimes view the routine mistakes of accountants as reckless or even intentional acts. See generally *In re Paris Air Crash*, 622 F.2d 1315, 1323 (9th Cir.), cert. denied, 449 U.S. 976 (1980) (Kennedy, J.) (noting "the temptation for a jury to award punitive damages even when concrete elements of fraudulent or intentional wrongdoing are absent"). For example, a Florida jury in 1984 awarded more than \$2 million in punitive damages to E.S.M. Group—at a time prior to the revelation that E.S.M. was permeated by fraud—against amicus Peat Marwick for "gross negligence amounting to fraud," based on the professional decision of two partners in one

<sup>10</sup> There have been instances in which individual members of amici's firms have been subjected to indictment and trial on criminal charges. See *United States v. Simon*, 425 F.2d 796 (2d Cir. 1969), cert. denied, 397 U.S. 1006 (1970) (two partners and a senior manager were convicted (but later pardoned) of conspiracy to commit mail fraud and to certify a false and misleading financial statement for Continental Vending Corporation); *United States v. Clark*, 360 F.Supp. 936 (S.D.N.Y.), mandamus denied, 481 F.2d 276 (2d Cir. 1973) (preliminary ruling on criminal actions against three accountants alleging securities law violations in connection with financial statements of Four Seasons Nursing Home Centers; two of the accountants were acquitted and charges against the third were dropped following a hung jury); *United States v. Natelli*, 527 F.2d 331 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976) (a partner was convicted (but later pardoned) of making false statements in the 1969 National Student Marketing proxy statement).

of the firm's Florida offices as to the form of report to be rendered on the client's financial statements. Similarly, a Mississippi jury recently awarded \$500,000 in punitive damages against amicus Touche Ross based on the jury's conclusion that personnel in the firm's Jackson office had been grossly negligent in their audit of a client's financial statements, even though the alleged negligence amounted to no more than a disagreement over the requirements of generally accepted accounting principles (GAAP) and generally accepted auditing standards (GAAS). In each of these cases, the local partners were engaging in the kind of discretionary decisionmaking that accountants must make constantly, and in which misjudgments unavoidably will occur.<sup>11</sup>

It is plainly senseless—and constitutionally excessive—to visit "punishment" and "deterrence" upon the thousands of partners in Peat Marwick's or Touche Ross's other offices who knew nothing of the Florida or Mississippi partners' actions. In contravention of this Court's decisions, punitive damage awards in these circumstances completely contradict the purposes that supposedly justify their existence. The conduct of a member of the professional staff who may himself be liable for punitive damages will be in many instances conduct that the firm could not have prevented. There obviously are inherent limits to the ability of any firm to prevent errors that juries might later find egregious enough to justify punitive liability.<sup>12</sup> See Note, *The Assessment of Punitive*

<sup>11</sup> The punitive award against Touche Ross was later set aside when the entire judgment was reversed on other grounds. *Touche Ross & Company v. Commercial Union Ins. Co.*, 514 So.2d 315 (Miss. 1987).

<sup>12</sup> As one commentator has explained:

[T]he labor intensive nature of auditing may set natural limits on the efficacy of further expenditures on care, even when the client is not actively seeking to produce fraudulent financial statements. Unlike product manufacturing, where design

*Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 Yale L.J. 1296, 1304 (1961). These limitations necessarily shape the constitutional inquiry required by the Eighth Amendment.

Moreover, the problem of vicarious liability for punitive damages is compounded for amici by the fact that they are organized as professional partnerships. Unless vicarious punitive awards are limited to those circumstances in which the firm itself engaged in the sort of egregious conduct necessary to support an award of punitive damages against the primary tortfeasor, every one of the thousands of partners that collectively constitute amici is personally at risk for punitive liability based on alleged torts committed by other partners or employees in one of the firms' hundreds of offices in which they conduct their far-flung operations—torts of which the partners may know nothing and about which the partners may be able to do nothing. See *Meleski v. Pinero Int'l Restaurant, Inc.*, 424 A.2d 784, 790-793 (Md. Ct. Spec. App. 1981) (affirming joint and several punitive award against partners without regard to whether the partners had authorized, ratified, or participated in the tort); see also *Hatrock*, 750 F.2d at 771, 773 n.3 (affirming jury's punitive award against brokerage firm due to tort of limited partner in one of its over 500 one-person

and manufacturing defects are typically remedied through "technological fixes," the central device for reducing risk in the accounting context is to increase the work hours devoted to the audit. Yet, either method of doing so—increasing the personnel or increasing the hours devoted to an audit—is likely at some point to increase, or at least fail to further decrease, audit risk. If more personnel are deployed on an audit, the risk of error may eventually begin to rise due to increased problems of supervision. Alternatively, if staffing remains unchanged while more time is devoted to an audit, a similar increase in audit risk will eventually occur as the informational basis of the audit becomes stale.

Siliciano, 86 Mich. L. Rev. at 1961-1962 (footnotes omitted).

offices even though jury found that brokerage firm had properly supervised its staff).

Consider the personal joint and several liability for a punitive damage award of each of the 120 partners in a hypothetical multi-city law firm attributable to the professional malpractice of one of the firm's 200 associates in one of its six offices who neglected to file a client's complaint until after the statute of limitations had run. It is simply irrational to suggest that each of the partners should be subjected to vicarious punitive liability for the tort of an associate for his work on a matter of which most of them would and could know nothing. Multiply the numbers in this hypothetical more than ten times over, and the risk faced on average by each of the partners in amici's firms becomes clear. In short, amici practice their profession in an environment in which the imposition of vicarious punitive liability for the individual torts of members or employees of the firm is, "by definition," constitutionally excessive.<sup>13</sup>

<sup>13</sup> Insurance, frequently invoked as the panacea for all liability problems, is no easy solution for amici. Apart from the general question whether punitive damages are insurable, on which the jurisdictions are divided, amici are dealing in a commercial insurance environment that lacks capacity for their needs. Commercial insurers are no longer willing to write policies at the limits they once provided. See Gossman, *The Fallacy of Expanding Accountants' Liability*, 1988 Col. Bus. L. Rev. 213, 230. This failure of insurance capacity is aggravated by the constant threat of punitive damages, because punitive damage awards are so arbitrary, and hence difficult for insurers to predict actuarially, that the safest solution for insurers is to reduce their own exposure to huge pay-outs by lowering the amount of insurance they write. See generally P. Huber, *Liability: The Legal Revolution and Its Consequences* 133-152 (1988); see also Siliciano, 86 Mich. L. Rev. at 1949-1950 (noting problems of claim predictability resulting in reduced insurance coverage for third-party tort claims against accountants).



**E. The Imposition of Vicarious Punitive Liability on Professional Service Firms Is Not Necessary to Further the Deterrent Purpose of Punitive Damages**

Amici already face powerful incentives to do all within their power to attempt to ensure that they will *not* fall short of the highest professional standards. These incentives include the preservation and enhancement of their professional reputations, which are a critical part of what amici offer clients (see Fischel, 52 Brooklyn L. Rev. at 1052; Note, 5 Yale L. & Pol'y Rev. at 525 & nn.51-53), and the exposure to liability for *compensatory* damages. See *id.* at 525 & n.55; *Smith v. Wade*, 461 U.S. at 50 (noting deterrent effect of compensatory liability); Note, 70 Yale L.J. at 1306 (same).<sup>14</sup>

Accounting firms in general and amici in particular therefore do a great deal to guard against inadequate professional performance. The accounting profession has long imposed upon itself an extensive system of self-regulation and monitoring to ensure the maintenance of the highest professional standards. The American Institute of Certified Public Accountants (AICPA), of which the individual CPAs affiliated with amici are members, promulgates numerous binding rules of conduct for auditing and other aspects of the profession, including a detailed set of requirements for quality control programs by accounting firms. See AICPA, *Professional Standards, Statements on Quality Control Standards* (CCH) 17,031-17,065 (1979). Among other things, these standards require amici to implement procedures to enhance independence, supervision of professional staff, and profes-

<sup>14</sup> In addition to the deterrent effect of compensatory awards, the transaction costs associated with defending against charges of liability provide yet another deterrent to culpable conduct. In 1988, amici collectively incurred over \$100 million in out-of-pocket defense costs. In addition, thousands of hours of professional time were necessarily diverted from the rendition of services to the defense of litigation.

sional development of staff (see *id.* § 10.07, at 17,062-17,063), as well as an annual inspection of the quality control procedures themselves (through review of internal administrative files and professional work papers) to obtain reasonable assurance that the procedures are being complied with (*id.* at 17,064; see also *id.* Interpretations of Quality Control Standards § 10-2.05, at 17,125-17,126).

In addition, membership in the section of the AICPA for accountants engaged to examine the financial statements of public companies whose shares are registered with the SEC (the SEC Practice Section) requires accounting firms to submit to and pay for a triennial peer review by a team of professionals from another member firm of the SEC Practice Section. See *SECPS Manual*, §§ 1, 2 (AICPA Div. for CPA Firms, SEC Practice Section 1986). The purpose of these peer reviews is to ensure the compliance of each member firm with AICPA quality control standards. The peer review involves an evaluation by the team of the firm's quality control system, a review of the firm's compliance with that system at each organizational level, a review of selected client engagements (including relevant work papers), and the preparation of a written report containing the results of the review. See *id.* § 2, at 2-5, 2-11 (Standards for Performing and Reporting on Peer Reviews).

Membership in the SEC Practice Section also requires each professional staff member of a member firm to put in at least 120 hours every three years on continuing professional education in accounting and auditing. See *SECPS Manual* § 1, at 1-7. During 1988 alone, amici collectively spent well over \$100 million on continuing education for their professional staff.

With this massive system of mandatory self-regulation already in place to avoid professional misjudgments, vicarious liability for punitive damages is hardly required to serve the deterrent purpose of causing amici to



initiate preventive measures. Because such awards are not rationally related to the deterrence of individual instances of professional misconduct, they are constitutionally excessive.

## II. THE CONSTITUTIONALLY PERMISSIBLE MEASUREMENT OF A PUNITIVE DAMAGE AWARD CANNOT TURN SOLELY ON A MULTIPLE OF COMPENSATORY DAMAGES OR THE SIZE OF THE DEFENDANT

As petitioners explain in their brief, the limitations imposed on punitive damage awards by the Excessive Fines Clause require a rational relationship between the size of the fine and the purposes of punitive damages—punishment and deterrence. Petitioners correctly recognize that no single factor will by itself establish that rational relationship, and they have thus examined how a number of factors may be aggregated to produce a reasonable range of permissible fines. In the first instance, however, we believe that the task of formulating standards for the measurement of punitive awards is best entrusted to the states. The Eighth Amendment operates only as a *limitation* on the standards that the states may permissibly employ; it does not mandate the use of any particular formula. Cf. *McKleskey v. Kemp*, 107 S.Ct. 1756, 1774 (1987) (Eighth Amendment establishes a constitutionally “required threshold below which the death penalty cannot be imposed” and requires “rational criteria” under state law). Thus, we focus the discussion that follows primarily on some of the standards commonly employed by the states that, if applied in isolation and without consideration of other relevant factors, are most likely to produce constitutionally excessive fines in violation of the Eighth Amendment.

### A. A Numerical Ratio Between Compensatory Damages and Punitive Damages Cannot by Itself Ensure a Constitutionally Permissible Limit on the Size of Punitive Damage Awards

It has sometimes been suggested that punitive awards should be set at some multiple of compensatory awards. See Pet. 26 n.16 (citing authorities in support of judging the excessiveness of a punitive award by resort to a formula three times the compensatory award). That approach may work reasonably well in certain cases; indeed, trebling the \$51,146 compensatory award assessed against petitioners in this case surely would have produced a more rational and constitutionally permissible punitive award than did the court of appeals’ exclusive focus on the relationship between the punitive award and petitioners’ net worth.

But a mechanical rule that tests the excessiveness of punitive damages solely by reference to their numerical relationship to the compensatory award will inevitably produce unconstitutional results in certain categories of cases. This is so because the amount of actual damages incurred by a plaintiff has no necessary connection to either the gravity of the wrongful conduct of the defendant or the extent of the benefit obtained by the defendant as a result of the wrong. See *In re Paris Air Crash*, 622 F.2d at 1322 (Kennedy, J.) (noting an “arbitrariness” to punitive damages that appears “inevitable when one considers two plaintiffs suffering identical traumatic injuries in two different accidents, one through negligence, the other through malice”). Indeed, it would be sheer fortuity if punitive damage awards that were determined only by reference to some multiple of compensatory damage awards resulted in constitutionally permissible fines.

The situations in which amici are exposed to tort liability provide a clear illustration of the constitutional infirmity in any rule that looks solely to a numerical

ratio between compensatory damages and punitive damages. Very large investments and business transactions such as mergers and acquisitions often hinge on the financial condition of the companies whose financial statements amici are called on by clients to examine. When these transactions go "sour," amici are frequently the only defendants with sufficient assets to satisfy claims made by disappointed investors or creditors. Thus, amici find themselves subject to potentially very large compensatory awards even though any culpability on their part is almost always many orders of magnitude less than that of others involved in a particular transaction. The sheer size of the underlying investment or transaction undertaken by the client typically means that the amount of compensatory damages assessed against amici for economic loss may be in the millions of dollars.<sup>15</sup>

<sup>15</sup> See, e.g., *Westmont Tractor Co. v. Touche Ross & Company*, No. 87-4242 (9th Cir. 1988) (\$5 million in compensatory damages); *Manufacturers Hanover Trust Co. v. Arthur Andersen & Co.*, No. 82-CIV-6622 (S.D.N.Y. 1988) (\$17 million in compensatory damages); *Scioto Memorial Hospital Ass'n v. Price Waterhouse*, No. 85CV-08-4513 (Ct. Common Pleas, Franklin Cty., Ohio 1988) (post-trial motions pending) (\$15.8 million in compensatory damages); *In re Osborne Securities Cases*, Coordination Proceeding No. 1805 (Santa Clara Cty., Cal. 1987), appeal pending, No. H003695 (Cal. App.) (\$4.2 million in compensatory damages assessed against amicus Arthur Young); *First Small Business Inv. Co. of Calif. v. Butler, Binion, Rice & Knapp*, No. H-84-3276 (S.D. Tex. 1987) and *Republic Venture Group, Inc. v. Butler, Binion, Rice & Knapp*, No. H-85-3528 (S.D. Tex. 1987), appeal pending, No. 87-6167 (5th Cir.) (\$5 million in compensatory damages assessed against amicus Coopers & Lybrand). See also *Nelson v. Bennett*, No. 83-820-RAR (E.D. Cal. 1988) (\$2.5 million pretrial settlement by amicus Deloitte, Haskins & Sells, followed by \$15 million settlement by Laventhol & Horwath after adverse verdict on liability and prior to determination of damages); *In re Continental Illinois Sec. Litig.*, No. 82-C-4712 (N.D. Ill. 1987) (claim of over \$200 million in compensatory damages against amicus Ernst & Whinney ending in judgment for defendant).

These large compensatory damages are altogether disproportionate to the gravity of the alleged wrong of the accountant—a wrong that, as previously described, may be no more than a professional misjudgment later found by a jury to have been "intentional," "reckless," or "grossly" negligent. A multi-million dollar compensatory award for such a misjudgment therefore already levies very substantial punishment and deterrence on the accounting firm. See *Smith v. Wade*, 461 U.S. at 50 (exposure to compensatory liability deters potential tortfeasors). In these circumstances, the rote application of a prescribed multiple of compensatory damages cannot produce a constitutionally permissible measurement of punitive damage awards.

Likewise, the very large compensatory damages to which amici are exposed are out of all proportion to the benefit an accounting firm might gain as a result of the wrong committed. Amici do not partake of the enormous economic gains shared by their clients and their clients' investment advisors; at most, the "benefit" that amici could expect to gain from any misconduct would be limited to the relatively modest income they receive from the particular professional services at issue. Thus, in the vast majority of cases confronted by amici, measuring punitive damage awards by reference to a multiple of compensatory damages can only produce a constitutionally excessive fine.<sup>16</sup>

<sup>16</sup> Although for the reasons stated in the text a multiple of compensatory damages cannot by itself provide the sole test of the excessiveness of a jury's award of punitive damages, the analysis in no way suggests that the *statutory* multiplication of compensatory damages may not be an altogether legitimate basis by which to measure punitive awards. See, e.g., 15 U.S.C. § 15 (treble damages for antitrust violations). This distinction derives from the fundamentally different institutional roles and capabilities of juries and legislatures. For example, a jury does not have the ability of a legislature to make detailed factual investigations to determine a rational way to fix punitive damages on the average for a par-



**B. The Size of a Punitive Damage Award Cannot Be Justified Solely by Reference to the Size of an Institutional Defendant**

The court of appeals in this case erroneously relied solely on petitioners' size to uphold the jury's punitive damage award. Amici agree with petitioners that the size of a firm cannot serve as the sole factor justifying the amount of an award of punitive damages. If the size of an institutional defendant, standing alone, were a sufficient benchmark to insulate a punitive damage award from constitutional attack, then the totality of the constitutional standard would perversely turn on who or what the defendant is rather than what the defendant did. Such a rule would transform the award of punitive damages into a game of "pin the tail on the biggest donkey" that can have no place in any rational system of punishment and deterrence.

Consistent with this analysis, this Court has held that the Eighth Amendment prohibits punishments "that are *disproportionate to the crime committed*." *Solem v. Helm*, 463 U.S. 277, 284 (1983) (emphasis added). See also *Robinson v. California*, 370 U.S. 660 (1962) (Eighth Amendment prohibits punishment of a mere status offense without reference to conduct). Similarly, proportionality between the size of the punitive award and the tortious conduct of the defendant must be the key to

particular class of cases. In contrast, legislative findings on such a question are squarely within the class of legislative determinations to which courts routinely defer. Second, unlike a legislature, a civil jury is an *ad hoc* body that exists only for the purpose of deciding a particular private dispute. Unlike a legislature, therefore, a jury is incapable of effectively considering the policies underlying the discrete task it is asked to perform, or the effects of its performance of that task beyond the case before it. Third, unlike a legislature, a jury does not embody the deliberate sense of the community as a whole concerning the overall purposes of punishment and deterrence, and is not directly responsible for what it does to the public at large.

Eighth Amendment scrutiny of punitive damages. The size of the defendant, viewed without reference to the conduct of the defendant, is a wholly irrational basis upon which to analyze the degree of proportionality between the punishment and what is to be punished. Moreover, the manifest dangers of prejudice and arbitrariness once the jury is presented with evidence of the defendant's size, fully set out in the briefs of petitioners and other amici, counsel in favor of tight restrictions on the jury's ability to consider that factor at all.

In the case of economic torts committed by defendants organized to produce an economic profit, such as petitioners and amici, the states may most easily serve the purpose of punitive damages and arrive at constitutionally proportionate punitive awards by setting the ceiling on the size of punitive awards with reference to the amount of the economic benefit the defendant gained or expected to gain from the commission of the tort. See, e.g., *United States v. Busher*, 817 F.2d 1409, 1417 (9th Cir. 1987) (court assessing constitutional excessiveness of statutory RICO forfeiture in particular case "may consider the benefit reaped by the convicted defendant"); *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1080-1081 (Ariz.) (noting the relevance to the excessiveness inquiry of "the profitability of the defendant's [wrongful] conduct"), cert. denied, 108 S. Ct. 212 (1987). A measure based primarily on the profit to be gained from the wrong ties the size of the punitive award to the motivation the intentional or reckless indulgence of which caused the economic actor to commit the tort; this is the motivation whose exercise a punitive award is intended to punish and deter.

For amici, as previously explained, the benefit to be realized by tortious misconduct must be measured with reference to the actual or expected economic gain that a firm hoped to realize for its professional services. See page 25, *supra*. Similarly, the court of appeals in this



case should have considered the amount that petitioners reasonably could have expected to gain by their predatory pricing. Had the court done so, it would have been readily apparent that a punitive award of \$6 million bore no rational relationship to petitioners' economic expectations and was far in excess of any amount necessary to satisfy the goals of punishment and deterrence.

### CONCLUSION

The judgment of the court of appeals should be reversed.

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**AMICUS CURIAE**

**BRIEF**

JAN 19 1989

JOSEPH E. SPANIOLO, JR.

CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC.  
and BROWNING-FERRIS INDUSTRIES, INC.,

v. *Petitioners,*

KELCO DISPOSAL, INC. and JOSEPH KELLEY,  
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

BRIEF OF AMICI CURIAE  
CBS INC., CAPITAL CITIES/ABC, INC.,  
DOW JONES & COMPANY, INC.,  
THE HEARST CORPORATION,  
NATIONAL BROADCASTING COMPANY, INC.,  
THE TIME INC. MAGAZINE COMPANY,  
TRIBUNE COMPANY,  
THE WASHINGTON POST, ASSOCIATED PRESS,  
THE AMERICAN SOCIETY OF NEWSPAPER EDITORS,  
ASSOCIATION OF AMERICAN PUBLISHERS,  
NATIONAL ASSOCIATION OF BROADCASTERS,  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

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No. 88-556

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BROWNING-FERRIS INDUSTRIES OF VERMONT, INC.  
and BROWNING-FERRIS INDUSTRIES, INC.,  
v. *Petitioners,*

KELCO DISPOSAL, INC. and JOSEPH KELLEY,  
*Respondents.*

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On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

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**BRIEF OF AMICI CURIAE  
CBS INC., CAPITAL CITIES/ABC, INC.,  
DOW JONES & COMPANY, INC.,  
THE HEARST CORPORATION,  
NATIONAL BROADCASTING COMPANY, INC.,  
THE TIME INC. MAGAZINE COMPANY,  
TRIBUNE COMPANY,  
THE WASHINGTON POST, ASSOCIATED PRESS,  
THE AMERICAN SOCIETY OF NEWSPAPER EDITORS,  
ASSOCIATION OF AMERICAN PUBLISHERS,  
NATIONAL ASSOCIATION OF BROADCASTERS,  
AND THE SOCIETY OF PROFESSIONAL JOURNALISTS,  
IN SUPPORT OF PETITIONERS \***

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**STATEMENT OF INTEREST**

This brief is submitted on behalf of thirteen amici curiae who include broadcasters, publishers of newspapers, magazines, and books, and associations of working

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\*Written consent of all parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 36.

journalists. Together, they comprise a broad cross-section of the news media in this country.

These amici have an intense interest in the subject matter under review. As members of the news media, they must operate under the constant threat of libel claims, almost all of which seek punitive damages. In recent years punitive damage awards against the media have increased both in frequency and amount at an alarming rate. They provide compelling examples of the irrational and uncontrolled nature of such awards. The threat of such unrestrained awards affects the nation's media at all levels, from national news organizations to the smallest local newspapers and broadcasters, and interferes with their vital task of keeping the public informed. Amici therefore, at a minimum, would support the constitutional limitations urged by the petitioner in this case. At the same time, amici urge the Court to recognize that punitive damages pose a distinct threat to First Amendment freedoms, and to consider the impact its decision in this case may also have in cases arising out of news reports and discussion of public affairs.

#### SUMMARY OF ARGUMENT

The libel decisions of this Court have examined the problem of unrestrained punitive damage awards and have already imposed limitations where discussion of public affairs is involved. The reasoning of these cases has been applied by the Court in non-libel cases as well, and serves as a valuable touchstone for addressing constitutional limitations on punitive damages in general.

As this case demonstrates, punitive damages may be awarded in virtually unlimited amounts, without regard to the actual harm caused and with inadequate standards to insure that "the punishment fits the crime." This blatant lack of due process results in excessive fines in violation of both the Eighth and Fourteenth Amendments.

Punitive damages encourage unnecessary litigation, permit arbitrary punishment of unpopular defendants, and often deter conduct that is lawful, socially beneficial, and even constitutionally protected. The harm caused by the threat of punitive damages far outweighs any arguable benefit.

#### ARGUMENT

##### I. THE EXPERIENCE OF MEDIA DEFENDANTS IN LIBEL CASES HIGHLIGHTS THE DANGERS OF UNRESTRAINED PUNITIVE DAMAGE AWARDS.

This Court has long recognized the danger of unrestrained punitive damages and the risk that juries will award them as "private fines" against unpopular defendants. Nowhere is the problem more sharply focused than in libel cases against the news media. Here, despite general agreement among courts and commentators that First Amendment concerns should limit the availability of such awards, substantial punitive damage awards have become the rule, not the exception.

##### A. Punitive Damage Awards in Libel Cases Have Increased Despite Constitutional Limits Imposed by the Court.

From the beginning of this Court's effort to reconcile the common law of libel with necessary constitutional limitations, it has recognized that the threat of unrestrained punitive damages raises severe constitutional problems as "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance on the criminal law." *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)).

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and again in *Rosenbloom v. Metromedia, Inc.*, 403 U.S.



29 (1971), the discussion of punitive damage awards occupied much of the Court's attention. Justice Harlan, originally supportive of punitive damages in *Butts*, expressly retreated from that position in *Rosenbloom*, and concluded:

I would hold unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done.

403 U.S. at 77 (Harlan, J., dissenting).

In the same case, Justices Marshall and Stewart concluded that punitive damages should be prohibited altogether in such cases:

[Punitive damages] serve the same function as criminal penalties and are in effect private fines. Unlike criminal penalties, however, punitive damages are not awarded within discernible limits but can be awarded in almost any amount. Since there is not even an attempt to offset any palpable loss and since these damages are the direct product of the ancient theory of unlimited jury discretion, the only limit placed on the jury in awarding punitive damages is that the damages not be "excessive," and in some jurisdictions that they bear some relationship to the amount of compensatory damages awarded. [Citation omitted.] The manner in which unlimited discretion may be exercised is plainly unpredictable.

*Id.* at 82-83 (Marshall, J., dissenting).

These dissenting opinions became the touchstone of the majority opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), where the Court concluded:

[P]unitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensa-

tion for injury. Instead, they are private fines levied by civil juries . . . .

*Id.* at 350.

Most recently, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), at least four members of the Court reasserted the objections to punitive awards discussed in *Rosenbloom* and *Gertz*, stressing the "largely uncontrolled discretion" of juries to assess damages "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused" as a rationale for the limitations imposed in *Gertz*. *Id.* at 778 (quoting *Gertz*, 418 U.S. at 350).

Each of these cases (with the exception of *Dun & Bradstreet*, which the plurality opinion characterized as a purely private libel) imposed constitutional limits on the availability of damages in libel cases, with the Court in *Gertz* holding simply:

[T]hat the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

418 U.S. at 349. Despite these limitations, both the amount and frequency of punitive damage awards against the media in libel cases have continued to rise.

In approximately 80 media libel actions tabulated by the Libel Defense Resource Center (LDRC) between 1980 and 1984,<sup>1</sup> and summarized in Appendix B to this Brief, the average verdict against media defendants was in excess of \$2,000,000. Approximately 60% of these awards included an award of punitive damages (as compared with less than 10% of non-libel cases involv-

<sup>1</sup> Libel Defense Resource Center, *Recent Trends in Libel Damage Awards Against the Media*, published in LDRC Bulletin No. 18 (December 15, 1986). The excerpt containing these facts appears as Appendix B to the brief.

ing money damages). The average punitive award in those cases was substantially in excess of \$2.5 million. In terms of dollars awarded, punitive damages accounted for some 80% of the total amount of the damages awarded. LDRC reports that even in constant dollars adjusted for inflation, today's media libel damage awards remain between 400% and 500% higher than in the decade preceding *New York Times v. Sullivan*.

These multi-million dollar awards are occurring in cases which often involve no actual economic loss and questionable injury;<sup>2</sup> the great majority are overturned or reduced on appeal;<sup>3</sup> their constitutionality has been questioned by courts and commentators alike.<sup>4</sup> Yet punitive damages continue to be awarded in ever-increasing amounts. The reasons behind this phenomenon are complex and may be a reflection of our times. But when the results become arbitrary and irrational, the Constitution demands a remedy, not only to protect free speech, but to preserve fundamental principles of due process of law.

<sup>2</sup> See, e.g., *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), cert. denied, 108 S. Ct. 1302 (1988).

<sup>3</sup> See LDRC Bulletin No. 11, November 15, 1984); Franklin, *Suing Media for Libel: A Litigation Study*, 1981 A.B.A. Res. J. 795, 829; Report, Committee on Communications Law, *Punitive Damages in Libel Actions*, 42 Record of Assoc. of Bar of City of New York, 20, 39-40 (Jan./Feb. 1987).

<sup>4</sup> See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 793-94 (1985) (Brennan, J., dissenting); see also *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (1975); *Taskett v. King Broadcasting Co.*, 86 Wn.2d, 439, 546 P.2d 81 (1976); *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 211 S.E.2d 674, cert. denied, 423 U.S. 991 (1975).

## B. Punitive Damages Are Arbitrarily Assessed Against Unpopular Defendants.

In theory, punitive damages are intended to punish and deter specific conduct that society finds reprehensible.<sup>5</sup> In practice, however, juries often use this uncontrolled weapon to punish defendants not for what they have done, but for who they are.

For example, in the LDRC libel damage studies discussed above, it is no mere coincidence that defendants such as *Hustler* and *Penthouse* magazines have suffered punitive damage verdicts in the eight-figure range more than once.<sup>6</sup> Less dramatic, but more troublesome in many ways, is the number of million dollar punitive awards that are imposed on news media defendants almost as a matter of course once the jury finds for the plaintiff on the question of liability.

It has been suggested that libel juries are merely reflecting a general shift of attitude on the subject of damages—that “[j]uries in all forms of tort litigation are finding for individual plaintiffs with less attention to the arguments of corporate defendants and greater inclination to award staggering damages than ever before,” and “that juries may tend to find whatever they are told is necessary for them to find if they thoroughly dislike the publisher, his publication, his general practices, or his business . . . .” Van Alstyne, *First Amendment Limitations on Recovery from the Press*, 25 Wm. & Mary L. Rev. 793, 795-96 (1985) (quoting Goodale,

<sup>5</sup> See, Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847, 849 (1985); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 282 (1983).

<sup>6</sup> See, e.g., LDRC Bulletin No. 18 (December 15, 1986) at 61-62 (citing *Guccione v. Hustler Magazine, Inc.*, No. 80AP-375 (Ohio October 8, 1981) (\$37,000,000); *Lerman v. Flynt Distributing Co.*, 745 F.2d 123 (2d Cir. 1984); cert. denied, 471 U.S. 1054 (1985) (\$33,000,000); *Pring v. Penthouse International*, 695 F.2d 438 (10th Cir. 1982) (\$25,000,000).



*Centuries of Libel Erased by Times*—Sullivan, 191 N.Y.L.J. 49 (1984)). Professor Van Alstyne also notes the possibility that attempts to restrict awards under the actual malice rule may have had the opposite impact on jurors:

[A] juror might suppose that if recklessness must be proved and if recklessness also entitles the defendant to consideration of punitive damages, then absent some exceptional reasons, the juror ought assuredly and quite routinely award punitive damages . . . .

*Id.* at 797. This attitude is not confined to libel cases. Once the defendant's conduct toward the plaintiff becomes an issue, the jury is almost always invited to "send a message" that the defendant—often a large corporation—cannot ignore. Unfortunately, there is very little guidance at that point to insure that the message is warranted by the defendant's conduct, and not merely by the jurors' distaste for the defendant's size, financial net worth, or even geographic distance from the plaintiff's home-town community. (The Vermont jury in the trial below was urged to "send a message to Houston and to Wall Street and to companies like BFI," and to do so with a punitive damage award big enough to "make an impression" on a company with gross sales in a ten-figure amount. See Appendix to Petition at 34a.)

As Justice Douglas reminded in his dissent in *Gertz*, the influence of emotion and prejudice is not confined to juries.<sup>7</sup> Excessive libel awards may reflect, in part, "localized judicial distaste for certain publishers" and judges' "understandable, but constitutionally improper, distaste for the defendant's publication." Van Alstyne, 25 Wm. & Mary L. Rev. at 801, 808. However, it is

<sup>7</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 359 (1974) ("Discussion of public affairs is often marked by highly charged emotions, and jurymen, not unlike us all, are subject to those emotions.").

virtually impossible to control such prejudice without objective standards and procedures that are totally missing in the civil context of punitive damages.

### C. The "Prize" of Unrestrained Punitive Damage Awards Encourages Expensive and Unnecessary Litigation and Deters Socially Beneficial Conduct.

The prospect of unlimited punitive damage awards against large corporations can and does change the character of litigation. The punitive damage lawsuit is not controlled by practical concerns of fair compensation for real loss suffered. It becomes an expensive, time-consuming, and wasteful exercise in litigation tactics—a high-stakes gamble on the jury's emotions, with a prize limited only by the defendant's net worth. Because the stakes are perceived to be so high, a punitive damages case and its defense will take on the inflated character of a multi-million dollar dispute, whether justified or not.

This lottery mentality is not confined to libel cases. It can lead to protracted and expensive litigation in virtually any kind of claim where the defendant's conduct, size, or wealth can be made an issue. And, as the experience with libel cases demonstrates, the promise of unrestrained rewards can subvert even the most carefully drawn system for compensating actual injury, and convert it to an emotional appeal to jury passion and prejudice. The end result is an irrational system in which the costs—"the encouragement of unnecessary litigation and the chilling of desirable conduct"—far outweigh the alleged benefits of punitive damages. *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

In the area of libel law, the "desirable conduct" chilled by the prospect of punitive damages translates into constitutionally protected conduct—i.e., free speech on matters of public concern. The need to protect this First



Amendment interest has been the driving force behind restrictions imposed in libel cases, but the Court's logic in articulating these limitations is not confined to the First Amendment. The arguments against uncontrolled jury discretion, unlimited "private fines" and unpredictable awards are just as compelling when applied to the punitive damage award presently before the Court. In fact, as Justice Brennan noted in his opinion in *Dun & Bradstreet*, the reasoning of *Gertz* has been applied in the Court's review of punitive damages in non-libel cases as well.<sup>8</sup>

## II. UNRESTRAINED PUNITIVE DAMAGE AWARDS VIOLATE BOTH THE EIGHTH AND FOURTEENTH AMENDMENTS.

Much has been written and argued about whether the Eighth Amendment prohibition against excessive fines should apply to the award of punitive damages.<sup>9</sup> Those who oppose its application argue that the Eighth Amendment was never intended to reach penalties outside the criminal law context. But even if this were so, it would only beg the question.

If a criminal fine is unconstitutional under the Eighth Amendment, it cannot be magically validated by calling it civil damages and allowing imposition under even *less* protection than would be required in the criminal context. And if the procedural and substantive rules purporting to govern the award of punitive damages would

<sup>8</sup> 472 U.S. at 780 n.4 (dissent); see, e.g., *Electrical Workers v. Foust*, 442 U.S. 42, 48-52 (1979) (union's breach of duty of fair representation); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) (municipal liability under § 1983).

<sup>9</sup> See, e.g., Jeffries, 72 Va. L. Rev. at 147-151; Note, *The Constitutionality of Punitive Damages in Libel Actions*, 45 Fordham L. Rev. 1382 (1977); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699 (1987).

result in excessive fines in the criminal context, they certainly cannot survive constitutional scrutiny in the civil context. This was the clear lesson of *New York Times Co. v. Sullivan*, where this Court discussed at length the punitive nature of libel damages and concluded: "What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil laws of libel." 376 U.S. at 277.

It matters very little whether the constitutional infirmity is described as a violation of due process under the Fourteenth Amendment or imposition of an excessive fine under the Eighth Amendment. In the final analysis, it is the absence of adequate standards, predictability, and evenhandedness that characterize excessive fines, and these are also essential due process concerns.

### A. The Eighth and Fourteenth Amendments Both Protect Against Arbitrary and Irrational Punishment.

The Eighth Amendment<sup>10</sup> functions broadly as a restraint on government-administered punishment, requiring proportionality, evenhandedness, and predictability in the assessment of fines.<sup>11</sup> See *Solem v. Helm*, 463 U.S. 277, 284 (1983); *McClesky v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262, 265 (1987). The due process clause of the Fourteenth Amendment likewise protects defendants from irrational verdicts by ensuring fundamental fairness.<sup>12</sup> Due process requires, as a minimum, that economic burdens imposed by a state bear a

<sup>10</sup> U.S. Const. amend. VIII (forbids the imposition of excessive fines, as well as excessive bail and cruel and unusual punishment).

<sup>11</sup> See also Jeffries, 72 Va. L. Rev. at 156 (the Eighth Amendment incorporated the concept of proportionality from the English Bill of Rights and Magna Carta); *Furman v. Georgia*, 408 U.S. 238, 255-57 (1972) (Douglas, J., concurring) (Eighth Amendment requires "penal laws that are evenhanded, non-selective, and non-arbitrary").

<sup>12</sup> U.S. Const. amend. XIV (forbids the deprivation of property without due process of law).

relationship to a legitimate state interest and are imposed in a manner that is neither arbitrary nor irrational.<sup>13</sup> *National R. R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 476-77 (1985). The unlimited discretion exercised by juries in awarding punitive damages invites awards that are unpredictable, arbitrary, and irrational.<sup>14</sup>

## B. Punitive Damage Awards Fail to Satisfy Either Constitutional Standard.

### 1. *The State Interests Arguably Served by Punitive Damages—Punishment and Deterrence—Are Legitimate Concerns of Criminal, Not Civil, Proceedings.*

The societal goals of punishment and deterrence are traditionally and best served by the criminal justice process. The award of civil damages serves a different purpose: "A fundamental premise of our [civil] legal system is the notion that damages are awarded to *compensate* the victim—to redress the injuries he or she *actually* has suffered." *Smith v. Wade*, 461 U.S. at 57 (Rehnquist, J., dissenting).

<sup>13</sup> See also *Electrical Workers v. Foust*, 442 U.S. 42, 50 & n.14 (1979); *Gertz*, 418 U.S. at 350; *Rosenbloom*, 403 U.S. at 82-84 (Marshall, J., dissenting).

<sup>14</sup> The problem is highlighted by the disturbing fact that some of the largest and most irrational awards have occurred in libel cases where, in theory, First Amendment interests demand even greater due process protection:

When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

*Speiser v. Randall*, 357 U.S. 513, 520 (1957); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. at 759 (Brennan, J., dissenting); *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349; *New York Times Co. v. Sullivan*, 376 U.S. at 269.

This Court has repeatedly recognized that punitive damages are *not* awarded to compensate for injury; that they are instead quasi-criminal fines meant to punish and deter outrageous conduct. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Rosenbloom v. Metro-media, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) (punitive damages "serve the same function as criminal penalties and are in effect private fines"); see also *Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting) (punitive damages are "private fines" and are "quasi-criminal"); *New York Times Co. v. Sullivan*, 376 U.S. at 269. Despite the fact that punitive damages and criminal fines are functional equivalents, the substantive laws and procedures under which the two are assessed bear almost no similarity.

Punitive damage awards in the civil context evade the constitutional protection of due process that would be required in a criminal case. In *New York Times Co. v. Sullivan*, this Court noted the punitive nature of libel damages and observed:

A person charged with violation of this [criminal libel] statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action . . . . And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded . . . for the same publications.

376 U.S. at 277; see *Bantam Books v. Sullivan*, 372 U.S. 58, 69-70 (1963); *Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting); see also Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 152-53 (1986).<sup>15</sup>

<sup>15</sup> The applicability of criminal procedural safeguards to punitive damages proceedings has been considered by numerous courts and commentators. See, e.g., Wheeler, *The Constitutional Case for Re-*



This Court has expressly and repeatedly rejected the idea that civil proceedings can avoid otherwise required protections. *New York Times*, 376 U.S. at 277; *Ingraham v. Wright*, 430 U.S. 651, 684 (1977) (White, J., dissenting) (“[I]f it is constitutionally impermissible to cut off someone’s ear for the commission of murder, it must be unconstitutional to cut off a child’s ear for being late to class.”); *Garrison v. Louisiana*, 379 U.S. 64, 67 n.3 (1965) (“whether the law be civil or criminal it must satisfy relevant constitutional standards”); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) (procedural protections are not avoided simply because a state chooses to fasten a label of “civil” on its conduct). At present, defendants may be punished more harshly and under looser standards by civil punitive damages than by criminal punishment. Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699, 1705 (1987).

## 2. Punitive Damages Are Awarded Irrationally, Without Regard to the Purposes They Allegedly Serve.

Even if the absence of criminal due process protection could be overlooked, fundamental fairness would demand that punitive damages be proportional to the severity of the act and that they be imposed evenhandedly to achieve their purposes of deterrence and retribution. Note, *Punitive Damages in Libel Law*, 98 Harv. L. Rev. 847, 859 (1985). But awards of punitive damages are all too often irrational without discernible reason for the imposition of the fine or its amount. *Rosenbloom*, 403 U.S. at 84 (Marshall, J., dissenting) (“The degree of admonition—the amount of the judgment in relation to the defamer’s means—is not, however, tied to any concept

forming Punitive Damages Procedures, 69 Va. L. Rev. 269, 322-33 (1983) (suggesting application of Fourth, Fifth and Sixth Amendments to punitive damages proceedings).

of what is necessary to deter future conduct”); Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 Dick. L. Rev. 609 (1986). Uncertainty over the amount of punitive damages that may be imposed, combined with the great discretion afforded juries, undercuts the goals of deterrence and retribution.<sup>16</sup> In fact, the random and arbitrary manner in which punitive damage awards are assessed fails to provide the necessary assurance that they further any legitimate purpose. Note, 98 Harv. L. Rev. at 859-60; Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 666 (1980). That assurance can be accomplished only by measuring the award against objective criteria, anything less is inadequate to meet due process standards. See *Giaccio*, 382 U.S. at 403-04.

Although some jurisdictions purport to impose limitations on punitive damages, objective analysis typically plays little or no role in a jury’s determination of punitive damages.<sup>17</sup> The rules against “excessive” punitive damages often translates into a mechanical calculation of the defendant’s net worth and a percentage of that worth represented by the punitive award. Thus, multi-million dollar awards against large corporate defendants may pass a “net-worth” test, despite the lack of any reasonable relationship to the actual harm caused or to fines that may be imposed as criminal punishments for the same conduct.<sup>18</sup>

<sup>16</sup> *Wheeler*, 69 Va. L. Rev. at 309 (“Because the current punitive damages system creates substantial risks of both overdeterrence and underdeterrence, the government’s interest weighs for . . . procedural reform.”).

<sup>17</sup> *Wheeler*, 69 Va. L. Rev. at 311 (“Prevailing punitive damages procedures . . . often ensure that there will be no relationship between culpability and punishment.”).

<sup>18</sup> The stated rationale for these apparently irrational results is that the punitive award must carry sufficient “sting” to punish the wrongdoer and deter future wrongful conduct. *Rosenbloom*, 403



A rule that measures punitive damages against the defendant's apparent wealth is not merely inconsistent with, it is antithetical to, the restrictions of the Eighth Amendment. Where the Eighth Amendment demands proportionality, evenhandedness, and predictability, punitive damages are permitted in "wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz*, 418 U.S. at 350; *Rosenbloom*, 403 U.S. at 84 (Marshall, J., dissenting).

In fact, they are often thousands of times greater than comparable criminal sanctions. For example, in *New York Times Co. v. Sullivan*, 376 U.S. at 277, the Court noted that the judgment of \$500,000—fairly modest in light of today's "megaverdicts"—was "1,000 times greater than the maximum provided by the Alabama criminal statute, and 100 times greater than that provided by the Sedition Act." Other cases demonstrate that multi-million dollar punitive damage awards have been imposed even where evidence of actual damage was questionable. See, e.g., *Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F. Supp. 1240 (N.D. Ill. 1986) (j.n.o.v. reducing compensatory damages to one dollar, but sustaining \$2,050,000 punitive damage award), modified on appeal, 827 F.2d 1119 (1987); *Guccione v. Hustler Magazine, Inc.*, 632 F. Supp. 313 (S.D.N.Y. (One dollar compensatory damages, \$1,600,000 punitive damages), rev'd, 800 F.2d 298 (2d Cir. 1986), cert. denied, 107 S. Ct. 1303 (1987)). Punitive damage awards that bear no relation to the actual harm suffered or the culpability of defendants are inherently arbitrary

U.S. at 73 (Harlan, J., dissenting); Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847, 849 (1985). However, the same interests in punishment and deterrence have been addressed in numerous legislative enactments that do not begin to approach such destructive measures. The use of statutory damages, enhanced damages, and similar remedial measures in excess of actual damages have been deemed sufficient by Congress to serve the state's interest. See, e.g., Copyright Act, 17 U.S.C. § 504; Sherman Act, 15 U.S.C. § 15.

and capricious; they are "excessive" fines prohibited by both the Eighth and Fourteenth Amendments.

### 3. *Punitive Damages Are Imposed Without Adequate Procedural Safeguards.*

Even if these substantive infirmities could be overcome, due process also requires that the procedures by which economic burdens are imposed be "adequate to safeguard against infringement of constitutionally protected rights." *Speiser v. Randall*, 357 U.S. 513, 521 (1958).<sup>10</sup> The uncontrolled discretion of juries to determine whether and how much punitive damages ought be awarded in a given case, exacerbated by standardless deferential appellate review, deprives defendants of the procedural protections guaranteed them by the Fourteenth Amendment. When such procedures "create an unnecessary and undue risk of an improper verdict on the issue of . . . whether to award punitive damages, and on the measure of punitive damages," due process is violated. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 276 (1983).

Implicit in the constitutional safeguards of the Eighth and Fourteenth Amendments is the fundamental concept that the government will impose economic sanctions only in accordance with undesirable legal standards. *Giaccio*, 382 U.S. at 402-03. The standards by which juries determine whether punitive damages are appropriate are vague and vary widely from state to state. Multi-million dollar awards of punitive damages are based on a jury's determination of whether the defendant's conduct was sufficiently "reprehensible" or "outrageous" to deserve them. Indeed, if the standards for liability in the first

<sup>10</sup> See also Sack & Tofel, 90 Dick. L. Rev. at 616 & n.46, 618; Report, Committee on Communications Law, *Punitive Damages in Libel Actions*, 42 Record of Assoc. of Bar of City of New York 20, 32-36 (Jan./Feb. 1987).

instance are as high or higher than those for punitive damages, the jury, without further guidance, may pick and choose among defendants who, under the law, may all be liable. *Smith v. Wade*, 461 U.S. at 51-52.

This Court has previously rejected punitive damages awards based on standards too vague and without substantive guidance for juries. *Smith v. Wade*, 461 U.S. at 41-42 (quoting *The Philadelphia, Wilmington & Baltimore Railroad Co. v. Quigley*, 62 U.S. (21 How.) 202 (1859) (rejecting punitive damages instruction that gave the jury little substantive guidance on proper threshold for punitive damages); *The Milwaukee and St. Paul Railway Co. v. Arms*, 91 U.S. 489 (1876) ("gross negligence" too vague a standard for assessing punitive damages). Because the standards for awarding punitive damages are "so vague [they] leave the public guessing its meaning" and "leave judges and jurors free to decide without legally fixed standards what is prohibited and the appropriate amount of penalty," they violate the first essential of due process.<sup>20</sup> *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

<sup>20</sup> Depending on the level of scienter required for liability, punitive damages can be virtually automatic upon a general finding of liability. The breadth of standards upon which States permit punitive damages often encroach upon the very same standards for determining liability in the first instance. See *Smith v. Wade*, 461 U.S. at 51. Nowhere is this problem more acute than in the libel context where in all public official/public figure cases once a jury has determined that a libel defendant acted with actual malice these damages tend to flow automatically. See, e.g., *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), cert. denied, 108 S. Ct. 1302 (1988). The jurors then have "free-wheeling discretion" to selectively punish unpopular speech and speakers. *Gertz*, 418 U.S. at 350. The end result is often exactly the type of content-based punishment that the First Amendment prohibits and this Court has emphatically disallowed. See *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Police Department v. Mosley*, 408 U.S. 92, 95 (1972).

Even if adequate standards may be postulated for determining whether punitive damages ought be imposed, the amount of those damages is left completely indeterminate. *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 100 L. Ed. 2d 62, 78 (1988) (O'Connor, J., concurring); *Wheeler*, 69 Va. L. Rev. at 285-86. In most jurisdictions, there are virtually no restrictions on the jury's authority to determine the severity of punishment. Once the plaintiff has convinced the jury that a defendant acted "outrageously" or, in some states "carelessly," damages may be imposed, limited only by the "gentle rule" that the award not be "excessive." *Dun & Bradstreet*, 472 U.S. at 778 (Brennan, J., dissenting).

In the ordinary tort case, this jury discretion to award any amount of damages as punishment when the defendant acts with some ill-defined mental state violates due process. *Giaccio*, 382 U.S. at 403 (statute that places no conditions upon jurors' power to impose costs is unconstitutional). In a case where the jury is invited, even encouraged, to "sting" the defendant, the only limitation on damages may be the jury's perception of the defendant's wealth.

#### 4. The Lack of Restraint on Punitive Damage Awards Is Exacerbated by Standardless And Deferential Appellate Review.

Standardless appellate review of punitive damage awards only aggravates Eighth Amendment and due process concerns. Appellate courts refuse to disturb a jury's award of these damages unless "monstrously excessive" or so large as to "shock the judicial conscience."<sup>21</sup> No meaningful criteria guide courts when

<sup>21</sup> See *Gertz*, 418 U.S. at 350; *Brown & Williamson v. Jacobson*, 827 F.2d at 1141 (multi-million dollar punitive damage award upheld because jury was not "mere putty in the hands of the plaintiff"); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1143-44 (7th Cir. 1985), cert. denied, 475 U.S. 1094 (1986); *Braun v.*



reviewing whether a jury acted out of "passion and prejudice" or when the amount is "excessive." And because juries need not follow any ascertainable standard, appellate courts cannot possibly determine whether the jury properly applied the law. *Wheeler*, 69 Va. L. Rev. at 290.

The rule has become "if it feels wrong, send it back," hardly a standard for promoting predictability. Without adequate standards for reviewing these awards, appellate courts cannot possibly operate as effective protectors against unconstitutional awards of punitive damages.

### III. THE HARM CAUSED BY UNRESTRAINED PUNITIVE DAMAGE AWARDS FAR OUTWEIGHS ANY ALLEGED SOCIETAL BENEFIT OF SUCH AWARDS.

Proponents of punitive damages in this and other cases may argue that this Court's discussion of punitive damages in the context of libel cases has no bearing here; that these prior decisions are "First Amendment cases." Such an argument would ignore Justice Brennan's scholarly discussion of the due process issue in *Dun & Bradstreet* and his observation that the Court's reasoning has been applied in non-libel cases as well:

These cases, like *Gertz*, recognized that "the alleged deterrent achieved by the punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule at least when the standards on which the awards are based are ill-defined."

472 U.S. at 780 n.4 (Brennan, J., dissenting) (quoting *Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting)).

*Flynt*, 726 F.2d 245, 257 (5th Cir.), cert. denied, 469 U.S. 883 (1984).

Certainly, there are distinct and overriding First Amendment concerns where the conduct deterred by punitive damages is discussion of public affairs. The need to encourage uninhibited debate, to protect unpopular opinion, and to avoid the dangers of self-censorship have all been recognized as First Amendment goals that are threatened by punitive damage awards. See *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350; *New York Times Co. v. Sullivan*, 376 U.S. at 278. Due process requirements are themselves heightened in such cases. *Speiser v. Randall*, 357 U.S. at 521.

But the "desirable conduct" alluded to by the Chief Justice need not rise to the level of constitutionally protected speech before it outweighs the hypothetical benefits argued in favor of punitive damages. And the overwhelming judicial costs, in terms of inflated and unnecessary litigation encouraged by such awards, weigh heavily indeed against any rationalization for this irrational remedy.

The harm caused by punitive damage awards—the threat to First Amendment values, the overbroad deterrence of beneficial conduct, the unnecessary drain on judicial resources, and above all, harm to the integrity of fundamental concepts of due process—when weighed against the theoretical justifications offered in the defense of such awards, leads to the conclusion that punitive damages are a remedy that society does not afford and the Constitution cannot permit.



## CONCLUSION

The unrestrained award of punitive damages violates the Eighth Amendment, the Fourteenth Amendment, and, where speech is involved, the First Amendment. Amici support the constitutional limitations on this remedy urged by the Petitioner.

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## **APPENDICES**

## APPENDIX A

## Identity of Individual Amici

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

Capital Cities/ABC, Inc., owns and operates a national television network (ABC), national radio networks, television and radio broadcasting stations, and publishes newspapers, magazines and books.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, *Barron's National Business and Financial Weekly*, a variety of national and international electronic news services, textbooks through its Richard D. Irwin, Inc. subsidiary, and 22 community daily newspapers through its Ottaway Newspapers, Inc. subsidiary.

The Hearst Corporation is a diversified privately held company that publishes newspapers magazines, and hard-cover and soft-cover books, and owns and operates a leading feature syndicate, television and radio broadcast stations and cable television systems.

National Broadcasting Company, Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

The Time Inc. Magazine Company is the largest publisher of general circulation magazines in the United States. It publishes *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money*, *Life*, and *Discover*.

Tribune Company is a communications company owning *The Chicago Tribune*, *The New York Daily News*, the *Orlando Sentinel*, the *Fort Lauderdale News and Sun-Sentinel*, the *Escondido (CA.) Times-Advocate*, the *Palo Alto Times-Tribune*, the *Newport News*, *Virginia Daily Press* and *The Times Herald*, and television stations in



Chicago, New York, Los Angeles, Denver, Atlanta and New Orleans.

The Washington Post is a newspaper published in the Washington, D.C. area with a daily circulation of 718,000 and a Sunday circulation of 1,079,000.

The Associated Press, the world's largest newsgathering organization, is a mutual news cooperative organized under the Not-For-Profit Corporation Law of the State of New York, and engages in the gathering and distribution of news of local, national and international importance to its member newspapers and broadcast stations across the United States and throughout the world.

The American Society of Newspaper Editors is a nationwide professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over 50 years ago, include ongoing efforts to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Association of American Publishers, Inc. is the major national association in the United States of publishers of general books, text books and educational materials. Its more than 200 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers including university presses and scholarly associations.

The National Association of Broadcasters is a non-profit, incorporated trade association of more than 4,900 radio stations, 950 television stations, and the major commercial broadcast networks.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization of over 21,000 members representing every branch and rank of print and broadcast journalism. It is the largest and oldest organization of journalists in the United States.

## APPENDIX B

[The following is an excerpt from the Libel Defense Resource Center Bulletin No. 18 published December 15, 1986.]

### Recent Trends in Libel Damage Awards Against the Media

#### (i) *The Size of Recent Media Damage Awards.*

According to the Libel Defense Resource Center the average (mean) initial damage award in eighty-one media libel actions tried between 1980 and 1984 that resulted in a plaintiff's verdict was *in excess of \$2,000,000*. LDRC Bulletin No. 11 (November 15, 1984) at 18 (Table B-9). Even eliminating the distorting effects of three awards of over \$10,000,000, the average award during this period still exceeded three-quarters of a million dollars. The average award during a period of several months in 1985, when no eight-figure awards were recorded, was almost \$1.8 million dollars. LDRC Bulletin No. 16 (March 15, 1986) at 44.

In terms of the sheer numbers of huge awards, LDRC has reported some *thirty* libel damage awards at or in excess of \$1 million since 1980. [Citation omitted.] In contrast, only *three* media libel awards at the *million-dollar* level were reported in the previous two decades.

In terms of the relative numbers of huge awards, the pace of million-dollar libel damages has also dramatically increased, according to LDRC data. In the pre-Sullivan decade, of thirty-eight libel damage awards initially entered only one was in excess of \$1 million—see Section (iii), *infra*. In contrast, in the period of 1980-84, almost 25% of the awards in media libel actions exceeded a million dollars. LDRC Bulletin No. 4 (Part 1) (August 15, 1982) at 8-17; LDRC Bulletin No. 11, *supra*, at 25-34 (listing cases and awards). In the last several months

of 1985, more than half of the media libel awards recorded by LDRC exceeded the million-dollar mark. LDRC Bulletin No. 16 (March 15, 1986) at 44.

(ii) *Punitive Damage Awards in Recent Media Libel Actions.*

Almost three out of five of the damage awards recorded by LDRC during the period 1980-84 included an award of punitive damages. More than one-third of those punitive awards was in excess of \$1 million. Indeed, the average punitive award in those cases was substantially in excess of \$2.5 million. During the last two years of the period, the average punitive damage award was almost \$3 million. In terms of dollars awarded during the period punitive damages accounted for some 80% of the total amount of damages awarded. LDRC Bulletin No. 11, *supra*, at 14-15.

(iii) *Comparison Data: Average Damage Awards in the Decade Prior to Sullivan.*

To put these data into further perspective the LDRC recently compiled a historical review of damages awarded in the decade prior to this Court's decision in *New York Times Co. v. Sullivan*. LDRC found that, in award during the pre-Sullivan period, excluding the distorting effects of the single million dollar award during that entire decade, was under \$50,000. LDRC Bulletin No. 17 (July 31, 1986). Indeed, the total amount of the awards in thirty-seven pre-Sullivan media libel cases reporting damage figures (again excluding the single million-dollar verdict) was \$1,839,468. This total for thirty seven cases is less than a single average case in today's world of libel litigation. While adjusting for inflation accounts for some portion of this massive disparity, LDRC reports that even in constant dollars today's media libel damage awards remain between 400% and 500% higher than the pre-Sullivan decade. *Id.*

(iv) *Comparison Data: Media Libel Awards Compared to Damages in Other Areas of Tort Litigation.*

LDRC has published data comparing and contrasting these libel trends with damage trends in two other areas of civil tort litigation—medical malpractice and product liability—that are also widely cited as having experienced a pattern of wild damage inflation. These non-libel torts often involve extensive economic injury and severe long-term physical debilitation. Nonetheless, libel actions against the media which rarely entail substantial economic loss, and even less frequently have provable physical impact, were found to yield higher average damage awards. The average damage awards in medical malpractice actions for the period 1980-84 was slightly in excess of three-quarters of a million dollars. (When million-dollar malpractice awards were excluded this figure dropped to under a quarter of a million dollars.) The average damage award in product liability actions for that same period was just under a million dollars. (When million dollar product liability awards were excluded this figure dropped to just over a quarter of a million dollars.) Jury Verdict Research, Inc., *Injury Valuation Reports: Current Award Trends*, No. 304 (1986) at 18-19.

As for the frequency of million-dollar awards in these comparison areas, between 1980 and 1984 million-dollar awards were entered in 24% of product liability cases—under the 25% frequency in media libel actions. The frequency of million-dollar awards in medical malpractice actions was lower still—21% during the same period. *Id.*

In contrast to the notable frequency with which punitive damages are being awarded against the media in libel actions, a recent study indicates that during a period ranging from 1981 to 1984 punitive damages were

awarded in a relatively low percentage of all civil cases involving an award of money damages. In two-thirds of the thirty-two reporting locations winning plaintiffs were awarded punitive damages less than 10% of the time. In New York City, Chicago and Los Angeles, for example, punitive damages were awarded in 1.6%, 2.2%, and 8.6% of the cases in which money damages were awarded, respectively. Imposition of punitive damages ranged from 0% in some locations to a maximum of 21.6% in the county with the highest rate of punitive awards. All locations reported far lower percentages than the recent nearly 60% average for punitive awards in media libel actions. Daniels, *Punitive Damages: The Real Story*, 72 ABA Journal 60 (August 1, 1986).



**AMICUS CURIAE**

**BRIEF**

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., AND  
BROWNING-FERRIS INDUSTRIES, INC.,

*Petitioners,*  
v.

KELCO DISPOSAL, INC., AND JOSEPH KELLEY,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN NATIONAL RED CROSS,  
THE AMERICAN TORT REFORM ASSOCIATION,  
THE ASSOCIATION FOR CALIFORNIA TORT REFORM,  
THE COUNCIL OF COMMUNITY BLOOD CENTERS,  
GENERAL ELECTRIC COMPANY,  
THE MERCHANDISING GROUP OF SEARS, ROEBUCK  
AND COMPANY AND THE TEXAS CIVIL  
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### QUESTION PRESENTED

*Amici curiae* will address the following issue:

Whether the emergence, for the first time, of punitive damage awards that are excessive by the standards of contemporary society provides a substantial basis for this Court to scrutinize extreme punitive jury verdicts under the Eighth Amendment's Excessive Fines Clause.



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## INTEREST OF THE AMICI

*Amicus* American National Red Cross ("Red Cross") is a charitable, not-for-profit organization chartered by Congress to fulfill the nation's responsibilities under the Geneva Convention and to maintain a system of national and international peacetime relief.

*Amicus* American Tort Reform Association ("ATRA"), which was formed in 1985, is a broad-based, bipartisan coalition of more than 400 businesses, corporations, municipalities, associations, professional firms and public interest and consumer groups who have pooled their resources to promote reform of the civil justice system to ensure fairness, balance and predicability.

*Amicus* Association for California Tort Reform ("ACTR") is the oldest organization in the country dedicated to educating the public about ways to improve California's civil liability system in terms of fairness, efficiency, economy, uniformity and certainty. Founded eleven years ago as a non-profit public benefit corporation, ACTR presently has close to four hundred members representing business, the professions and local government. (See Appendix B for list of numbers.)

*Amicus* Council of Community Blood Centers is an association of not-for-profit community-based blood centers which are responsible for over 25 percent of the nation's volunteer blood supply.

*Amicus* General Electric Company ("General Electric") is a diversified manufacturing and financial services concern. *Amicus* the Merchandising Group of Sears, Roebuck and Company ("Sears") is the nation's largest retailer of goods and services.

*Amicus* Texas Civil Justice League ("TCJL"), created in 1986, is a 1700 member organization of individuals,



municipalities, associations and corporations in Texas who are concerned with the current state of the civil justice system.

It may not be self-evident what common reason these seven organizations have to file a brief in this case. But their shared interest arises from the fact that they have become in recent years acutely aware of the potentially catastrophic impact that the liability for punitive damages may have upon all potential tort defendants. The three tort reform associations all were created within the last eleven years in response to widespread criticism of the civil justice system. Prior to that time, the tort system may have had flaws but they seemed manageable. That no longer is true and therefore organizations from all sectors of society have grown increasingly concerned about the impact of unrestricted jury awards.

For that reason the Red Cross, ACTR, the Council of Community Blood Centers, General Electric, Sears and TCJL, all of whom are members of ATRA, have joined with it in submitting a single brief. These organizations and their members now routinely face demands in civil litigation for multimillion dollar punitive damage awards, demands that simply were unheard of as recently as 20 years ago. *Amici* therefore wish to present their views to the Court concerning the dramatic changes that recently have occurred in the area of punitive damages. In particular, *amici* propose to demonstrate that application of the Excessive Fines Clause to punitive damage awards does not require a novel extension of the Eighth Amendment, and that, to the contrary, changes in the law and practice of punitive damages now make constitutional scrutiny of such damage awards appropriate.<sup>1</sup>

<sup>1</sup> Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In deciding whether and how to apply the Eighth Amendment's proscription against excessive fines to a \$6 million punitive damage award—the penalty imposed upon petitioners by the jury in this case—one preliminary issue warrants extended consideration: Why should the Court now, for the first time in 200 years, scrutinize an award of punitive damages under the Excessive Fines Clause of the Eighth Amendment? The answer is that the Court has not, until very recently, had occasion to consider whether punitive damage awards are subject to constitutional review. Neither this nor any other court was even asked by a litigant to consider whether the Eighth Amendment applied to civil punitive damage awards until after 1980. This is not because defendants' attorneys lacked imagination; it is because, historically, such awards were not "excessive." Only recently have punitive damages been awarded at a level that would warrant this Court's attention—a level that would have been unimaginable to courts a generation ago, much less to the framers of the Constitution.

Punitive damages are today awarded with a frequency and in amounts that are startling. In certain categories of civil litigation, a third or more of the plaintiffs who prevail receive punitive awards. And these awards may be enormous: punitive verdicts exceeding \$1 million, while certainly not the norm, have become almost commonplace.

This system of punitive damages—where punitive awards are routine and fantastic verdicts receive little attention—is entirely a product of the last 20 years. For almost all of the nation's history, through the nineteenth and the first half of the twentieth centuries, punitive damages were largely reserved for the redress of torts that were viewed as especially offensive. When punitive damages were awarded, the amounts were quite small by present-day standards: the largest nineteenth century awards were worth approximately \$50,000 to

\$60,000 in 1987 dollars. Such sums, while surely substantial, were neither noteworthy nor excessive in the terms of the day; they were, for example, in line with the civil and criminal fines imposed by nineteenth century legislatures for conduct similar to that giving rise to punitive verdicts.

Beginning about 1960, however, this regime of punitive damages underwent a dramatic transformation. The most comprehensive empirical study of punitive awards over time, conducted in San Francisco and Cook Counties by the RAND Institute for Civil Justice, found that the rate at which punitive damages were awarded increased in the two jurisdictions by almost 700% and almost 2000%, respectively, from the early 1960s to the early 1980s. The change in the size of punitive awards over the same period—viewed in constant dollars—was equally stunning. In San Francisco, the median punitive verdict increased by almost 400% and the average punitive award by more than 200%; in Cook County, the median punitive award increased by 4300% and the average by 10,000%. Indeed, in many jurisdictions the average punitive award now approaches or exceeds \$1 million.

In reciting these statistics, we do not mean to overstate the perils of the punitive damage system. Punitive awards are still not routine (in the sense that they do not accompany a majority of plaintiffs' verdicts), and million dollar punitive damage judgments are returned in only a small fraction of cases. But any punitive awards in the million dollar range are an entirely new phenomenon. Even taking into account the effects of inflation, today's largest punitive damage judgments are an order of magnitude larger than the grandest awards of the last century; million dollar awards were literally unheard of even a generation ago. More broadly, it is only in the last 20 years that juries have started to render punitive verdicts that dramatically exceed the size of the fines that legislatures consider appropriate punishment for similar misconduct.

Viewed against this background—through the prism of history—it is clear that petitioners are not propounding a novel constitutional theory when they contend that the Eighth Amendment's guarantees apply to the award of punitive damages. To the contrary, petitioners seek only to apply well-settled Eighth Amendment principles to a newly emerging problem: the award of punitive damages that are excessive by the standards of contemporary society. Compare *Trop. v. Dulles*, 356 U.S. 86 (1958).

### ARGUMENT

#### THE APPLICATION OF CONSTITUTIONAL LIMITS TO PUNITIVE DAMAGES IS NOW APPROPRIATE BECAUSE THOSE DAMAGES ARE BEING AWARDED AT A FREQUENCY AND IN AMOUNTS THAT ARE UNPRECEDENTED AND, BY HISTORICAL STANDARDS, ARE EXCESSIVE

##### A. From The Eighteenth Through The Mid-Twentieth Centuries, Punitive Damages Were Awarded As Redress For Limited Categories Of Torts And In Limited Amounts

1. *English Law.* The doctrine of punitive damages in its current form—the idea that juries may award damages in tort that exceed the plaintiffs' tangible injuries—was first recognized by English courts in 1763. In *Wilkes v. Wood*, 98 Eng. Rep. 489, 498-499 (C.P. 1763), one of a pair of cases decided that year invalidating searches and seizures under a general warrant, Chief Justice Pratt held that the jury could "give damages for more than the injury received." Suggesting that conduct "totally subversive of . . . liberty" may "aggravate damages" in an action against a Crown officer, the Chief Justice explained that damage awards in such cases may serve "not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."

*Wilkes'* companion case, *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), also involved oppressive conduct



by a government officer.<sup>2</sup> The court in *Huckle* was the first to make use of the term "exemplary damages" in upholding an award that exceeded measurable harm to the plaintiff. See generally *Rookes v. Barnard*, 1 All E.R. 367, 407-08 (H.L. 1964) (Devlin); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 14 (1982).

These holdings were followed by decisions approving the award of punitive damages in a case of assault and battery where, although the injury was not severe, the plaintiff "ha[d] been used unlike a gentleman" (*Grey v. Grant*, 95 Eng. Rep. 794, 795 (C.P. 1764)); in an action where an officer ordered a common soldier whipped and the soldier, "though not much hurt indeed, was scandalized and disgraced by such a punishment" (*Benson v. Frederick*, 97 Eng. Rep. 1130 (K.B. 1766)); and in a suit for seduction of the plaintiff's daughter, which was deemed especially offensive because "the plaintiff . . . received this insult in his own house; where he had civilly received the defendant, and permitted him to make his addresses to his daughter" (*Tullidge v. Wade*, 95 Eng. Rep. 909 (C.P. 1769)).<sup>3</sup> Like the decisions involving invalid warrants, "all of these cases share one common

<sup>2</sup> The Chief Justice explained that the jurors "saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them. . . . To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour." 95 Eng. Rep. at 769.

<sup>3</sup> Several other decisions from the same period upheld awards of damages that were not directly tied to the plaintiffs' tangible losses, although the rulings did not explicitly refer to a doctrine of exemplary damages. See *Beardmore v. Carrington*, 95 Eng. Rep. 790 (C.P. 1764) (illegal search); *Sharpe v. Brice*, 96 Eng. Rep. 557 (C.P. 1774) (illegal search); *Leith v. Pope*, 96 Eng. Rep. 777 (C.P. 1780) (malicious prosecution, an offense that was particularly serious because it involved an accusation of a capital crime); *Duberley v. Gunning*, 100 Eng. Rep. 1226 (K.B. 1792) (criminal conversation).

attribute: they involved acts that resulted in direct affronts to the honor of the victims. The defendants' acts were insults that were likely to provoke reactions of outrage." Ellis, *supra*, 56 S. Cal. L. Rev. at 15. See K. Redden, *Punitive Damages*, § 2.2(A)(2) (1980).

Against the background of these cases, the scholarly consensus is that common law courts developed the doctrine of punitive damages in an attempt to rationalize damage awards that exceeded the plaintiff's tangible injury during a period when judges had grave doubts about their authority to set aside jury verdicts. See Ellis, *supra*, 56 S. Cal. L. Rev. at 12, 14; Sullivan, *Punitive Damages in the Law of Contract: The Reality and Illusion of Legal Change*, 61 Minn. L. Rev. 207, 214 (1977).<sup>4</sup> At the same time, the award of punitive damages in cases of outrageous and insulting conduct allowed the jury to redress the plaintiff's humiliation and emotional distress in an era when those forms of injury generally were not compensable. Several of the early English cases, in fact, mingled the concepts of punishment and compensation, effectively concluding that the outrageous conduct of the defendant both necessitated and justified an "exemplary" award that would redress

<sup>4</sup> Though the end of the eighteenth century, judges remained extremely reluctant to set aside jury verdicts on excessiveness grounds; they opined that it was appropriate only when the award was "monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush." *Beardmore v. Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764). See *Sharpe v. Brice*, 96 Eng. Rep. 557 (C.P. 1774) ("in torts a greater latitude is allowed to the jury: and the damages must be excessive and outrageous to require or warrant a new trial"); *Leith v. Pope*, 96 Eng. Rep. 777, 778 (C.P. 1780) ("in cases of tort the Court will not interpose on account of the largeness of damages, unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury" (footnote omitted)); *Duberley v. Gunning*, 100 Eng. Rep. 1226, 1228 (K.B. 1792) ("[w]e have no right in such a case to set up our own judgment against that of the jury, to which the constitution has referred the decision of the question of damages").



the plaintiff's intangible injuries. See K. Redden, *supra*, §§ 2.2(B) and 2.2(D); McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C.L. Rev. 129, 132 (1930); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518-19 (1957).<sup>8</sup>

This, then, was the understanding of the jury's power to award nominally punitive damages at the time of the drafting of the Constitution. While the notion of civil punishment for certain forms of misconduct can be traced at least to the Magna Carta, the express recognition of the jury's power to award punitive damages in tort to a plaintiff was, in the late eighteenth century, quite new. It was confined to cases involving a narrow range of outrageous and insulting behavior. And it was exercised, at least in part, for purposes that modern courts would view as compensatory.

2. *Early American Law.* a. The jury's power to award punitive damages in tort suits was vigorously debated by American courts and commentators throughout the nineteenth century, and that power was rejected or limited in a number of jurisdictions. See *Smith v. Wade*, 461 U.S. 30, 35, 37 n.5 (1983) (citing cases); *id.* at 58 & n.2, 59 (Rehnquist, J., dissenting). Compare T. Sedgwick, *A Treatise on the Measure of Damages* 45-46 n.t.

<sup>8</sup> The courts explained that "[t]here is great difference between cases of damages which be certainly seen, and such as are ideal, as between assumpsit, trespass for goods, where the sum and value may be measured, and actions of imprisonment, malicious prosecution, slander, and other personal torts, where the damages are matter of opinion, speculation, ideal." *Beardmore v. Carrington*, 95 Eng. Rep. 790, 792 (C.P. 1764). In the latter class of torts, "where the damages depend upon mere sentiment and opinion, the Court have no line to go by; and therefore it would be very dangerous for [judges] to interfere." *Duberley v. Gunning*, 100 Eng. Rep. 1226, 1228 (K.B. 1792). Indeed, Lord Devlin was of the view that, with the exception of cases involving oppressive government conduct, all of the early English decisions could be explained as instances of "aggravated damages"—that is, real but intangible damages. See *Rookes, supra*, 1 All E.R. at 412.

(1847) and 1 T. Sedgwick, *A Treatise on the Measure of Damages* § 349 (A. Sedgwick & J. Beale 9th rev. ed. 1912) (accepting doctrine) with 2 S. Greenleaf, *A Treatise on the Law of Evidence* § 253 (S. Crosswell 14th rev. ed. 1883) (rejecting doctrine). See generally 1 T. Street, *The Foundations of Legal Liability* 478-82 (1906); G. Field, *A Treatise on the Law of Damages* 65-66 (1876). This Court, however, expressly recognized the propriety of punitive damage awards in 1852 (*Day v. Woodworth*, 54 U.S. (13 How.) 389, 399 (1852) (dictum)); a majority of state courts, many of which which addressed the question in the latter half of the nineteenth century, followed suit. See Note, *supra*, 70 Harv. L. Rev. at 518 n.3.

This Court extensively canvassed a portion of this history in *Smith v. Wade, supra*, exploring the state of mind required in the late nineteenth century to support an award of punitive damages. See 461 U.S. at 38-46; *id.* at 68-84 (Rehnquist, J., dissenting). But regardless of how the requisite mental state was described at the time, it is plain that punitive awards typically were granted only in the case of torts that were deemed especially offensive or that placed life and limb in danger. "[A]s a general rule," this Court explained in 1876, "the plaintiff recovers merely" compensation for his injury. *Milwaukee & St. P. R.R. v. Arms*, 91 U.S. 489, 492 (1876) (emphasis in original). Accord *Missouri Pac. R.R. v. Humes* 115 U.S. 512, 521 (1885). In contrast, until well into the twentieth century, punitive damages were available in the United States only in a "comparatively small class of torts" (T. Street, *supra*, at 479)—those involving what the earliest American decisions described as conduct "of the most atrocious and dishonorable nature." *Coryell v. Colbaugh*, 1 N.J.L. 90, 91 (1791). See R. Bauer, *Essentials of the Law of Damages* § 47 (1919).

For the most part, these offenses were "dignitary torts," principally "the traditional intentional torts." *Symposium Discussion*, 56 S. Cal. L. Rev. 155, 156 (1982) (remarks

of Prof. Ellis). They included assault and battery,<sup>6</sup> false imprisonment,<sup>7</sup> libel and slander,<sup>8</sup> seduction,<sup>9</sup> conduct amounting to reckless endangerment,<sup>10</sup> and flagrant cases

<sup>6</sup> See, e.g., *Barlow v. Lowder*, 35 Ark. 492 (1880); *Ward v. Blackwood*, 41 Ark. 295 (1883); *Lyon v. Hancock*, 35 Cal. 372 (1868); *Welch v. Durand*, 36 Conn. 183 (1869); *Huber v. Tueber*, 10 D.C. (3 MacArth.) 484 (1877-79); *Green v. Southern Express Co.*, 41 Ga. 516 (1871); *Drohn v. Brewer*, 77 Ill. 280 (1875); *McIntyre v. Sholty*, 121 Ill. 660 (1887); *McNamara v. King*, 7 Ill. 432 (1845); *Nossaman v. Rickert*, 18 Ind. 350 (1862); *Taber v. Hutson*, 5 Ind. 322 (1854); *Southern Kan. Ry. v. Rice*, 38 Kan. 398 (1888); *Worford v. Isabel*, 4 Ky. 247 (1808); *Pike v. Dilling*, 48 Me. 539 (1861); *Baltimore & O. R.R. v. Blocher*, 27 Md. 277 (1867); *Gaither v. Blowers*, 11 Md. 536 (1857); *Lucas v. Michigan Cent. R.R.*, 98 Mich. 1 (1893); *Corwin v. Watson*, 18 Mo. 71 (1853); *Goetz v. Amba*, 27 Mo. 28 (1858); *Fay v. Parker*, 53 N.H. 342 (1872); *Pendleton v. Davis*, 46 N.C. (1 Jones) 98 (1853); *Roberts v. Mason*, 10 Ohio 278 (1859); *Porter v. Seiler*, 23 Pa. 424 (1854); *Earl v. Tupper*, 45 Vt. 275 (1873); *Hoadley v. Watson*, 45 Vt. 289 (1873); *Borland v. Barrett*, 76 Va. 128 (1882); *Barnes v. Martin*, 15 Wis. 263 (1862); *Bass v. Chicago & N.W. Ry.*, 39 Wis. 636 (1876); *Crucker v. Chicago & N.W. Ry.*, 36 Wis. 657 (1875).

<sup>7</sup> See, e.g., *Lake Shore & Mich. S. Ry. v. Prentice*, 147 U.S. 101 (1892); *Green v. Southern Express Co.*, 41 Ga. 516 (1871); *Schlencker v. Risley*, 4 Ill. 483 (1842); *Taber v. Hutson*, 5 Ind. 322 (1854); *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350 (1887); *Parsons v. Harper*, 16 Gratt., 64 (Va. 1860); *Hamlin v. Spaulding*, 27 Wis. 360 (1870).

<sup>8</sup> See, e.g., *Louisville & N.R.R. v. Ballard*, 85 Ky. 307, 3 S.W. 530 (1887); *Sheik v. Hobson*, 64 Iowa 146 (1884); *Bodwell v. Osgood*, 3 Pick. 379 (Mass. 1825); *Ellis v. Brockton Publishing Co.*, 198 Mass. 538 (1908); *Buckley v. Knapp*, 48 Mo. 152 (1871); *Vunck v. Hull*, 3 N.J.L. 165 (1809); *Cook v. Hill*, 5 N.Y. Sup. Ct. 341 (1849); *Gilreath v. Allen*, 32 N.C. (10 Ired.) 67 (1849); *Bensway v. Conyne*, 3 Pin. 196 (Wis. 1851).

<sup>9</sup> *Coryell v. Colbaugh*, 1 N.J.L. 90 (1791); *McAulay v. Birkhead*, 35 N.C. (13 Ired.) 28 (1851).

<sup>10</sup> See, e.g., *Linsley v. Bushnell*, 15 Conn. 225 (1842) (personal injury and property damage caused by overturned cart intentionally left on public highway); *Cameron v. Bryan*, 89 (Iowa) 214 (1893) (personal injury caused by attack by dog); *Whipple v. Walpole*, 10 N.H. 130 (1839) (property damage and personal injury caused by

of trespass and conversion, malicious attachment, or destruction of property.<sup>11</sup> These torts were often accompanied by insulting or abusive behavior<sup>12</sup> and courts

poorly maintained bridge); *Meibus v. Dodge*, 38 Wis. 300 (1875) (personal injury caused by attack by vicious dog); *Picket v. Crook*, 20 Wis. 377 (1866) (personal injury caused by roaming ram).

<sup>11</sup> *Clark v. Bales*, 15 Ark. 452 (1855) (trespass and conversion of farm animal and destruction of property); *Kelly v. McDonald*, 39 Ark. 387 (1882) (trespass and malicious attachment of household property); *Dorsey v. Manlove*, 14 Cal. 553 (1860) (trespass and malicious attachment of farm animals); *Nightingale v. Scannell*, 18 Cal. 315 (1861) (trespass and conversion of manufacturing equipment); *Dennison v. Hyde*, 6 Conn. 507 (1827) (trespass and conversion of goat); *Dibble v. Morris*, 26 Conn. 416 (1857-58) (trespass and conversion of cattle); *Edwards v. Beach*, 3 Day 447 (Conn. 1809) (trespass and destruction of business property); *Huntley v. Bacon*, 15 Conn. 267 (1842) (trespass and malicious attachment of personal property); *Merrills v. Tariff Mfg. Co.*, 10 Conn. 384 (1835) (trespass and destruction of property); *Trent v. Barber*, 7 Conn. 274 (1828) (trespass and malicious attachment of personal property); *Humphries v. Johnson*, 20 Ind. 190 (1863) (trespass and destruction of business supplies and equipment); *Brown v. Allen*, 35 Iowa 306 (1872) (trespass and conversion of crops); *Thomas v. Isett*, 1 Greene 470 (Iowa 1848) (trespass and malicious attachment); *North v. Cates*, 5 Ky. 591 (1812) (trespass and destruction of fence and real property); *Taylor v. Giger*, 3 Ky. 595 (1808) (trespass and destruction of real property and timber); *Moore v. Withenburg*, 13 La. Ann. 22 (1858) (trespass and malicious attachment of steamboat); *Wilkinson v. Drew*, 75 Me. 360 (1883) (trespass and destruction of real property and timber); *Schindel v. Schindel*, 12 Md. 108 (1858) (trespass and conversion of household property); *Lynd v. Picket*, 7 Minn. 184 (1862) (trespass and malicious attachment); *Whitfield v. Whitfield*, 40 Miss. 352 (1866) (trespass and conversion of farm animals and wagon); *Berry v. Vreeland*, 21 N.J.L. 183 (1847) (trespass and destruction of real property); *Pastorius v. Fisher*, 1 Rawle 27 (Pa. 1828) (trespass and destruction of real property); *Bradshaw v. Buchanan*, 50 Tex. 492 (1878) (trespass upon real property); *Cole v. Tucker*, 6 Tex. 266 (1851) (trespass and destruction of farm animal and crops); *Dillon v. Rogers*, 36 Tex. 152 (1871-72) (trespass and conversion of timber).

<sup>12</sup> See, e.g., *Lake Shore & Mich. S. Ry. v. Prentice*, 147 U.S. 101 (1892) (passenger publicly humiliated and falsely arrested); *Kelly v. McDonald*, 39 Ark. 387 (1882) (public humiliation resulting



occasionally held that even intentional infliction of injury would not justify an award of punitive damages unless "accompanied by personal insult, or oppressive and cruel conduct."<sup>13</sup> As a leading nineteenth century commentator explained, "[t]he kind of wrongs to which [punitive damages] are applicable are those which, besides the violation of the right or the actual damage, impart insult or outrage . . . ." F. Pollock, *A Treatise on the Principles of Obligations Arising From Civil Wrongs in the Common Law* 125 (N.Y. ed. 1892). See P. Huber, *Liability: The Legal Revolution and Its Consequences* 119 (1988); T. Shearman & A. Redfield, *A Treatise on the Law of Negligence* § 600 (1869) (punitive damages reserved for "morally criminal" conduct).

As a general matter, liability for punitive damages through the nineteenth and into the twentieth centuries

from malicious attachment and wrongful public sale); *Treat v. Barber*, 7 Conn. 274 (1828) (trespass and malicious attachment involving insulting language); *Nossaman v. Rickert*, 18 Ind. 350 (1862) (plaintiff assaulted and "seized by his privates"); *Taber v. Hutson*, 5 Ind. 322 (1854) (plaintiff falsely imprisoned); *Southern Kan. Ry. v. Rice*, 38 Kan. 398 (1888) (passenger assaulted and ejected from car); *Louisville & N.R.R. v. Ballard*, 85 Ky. 307, 3 S.W. 530 (1887) (female passenger rudely ejected from train); *Goddard v. Grand Trunk Ry. of Can.*, 57 Me. 202 (1869) (passenger threatened and falsely accused of not paying fare); *Lucas v. Michigan Cent. R.R.*, 98 Mich. 1 (1893) (passenger ejected from train); *McCarthy v. Niskern*, 22 Minn. 90 (1875) (patron ejected from inn by keeper using abusive language); *Coryell v. Colbaugh*, 1 N.J.L. 90 (1791) (action for seduction and breach of promise to marry); *Parsons v. Harper*, 16 Gratt. 64 (Va. 1860) (plaintiff falsely imprisoned for two days); *Bass v. Chicago & N.W. Ry.*, 39 Wis. 636 (1876) (crippled passenger forceably ejected from train by brakeman); *Benaway v. Conyne*, 3 Pin. 196 (Wis. 1851) (slanderous statements made regarding wife's fidelity); *Cracker v. Chicago & N.W. Ry.*, 36 Wis. 657 (1875) (female passenger accosted by train conductor).

<sup>13</sup> *Barlow v. Lowder*, 35 Ark. 492, 494 (1880). Thus, the Arkansas courts found punitive damages inappropriate in an assault case where there was "no evidence of previous malice, nor of deliberate cruelty, only of hot blood and a certain recklessness." *Ward v. Blackwood*, 41 Ark. 295, 301 (1883).

was confined to the categories of tort described above. In particular, with the exception of actions for breach of contract to marry—suits that plainly have a strong dignitary component (see McCormick, *supra*, 8 N.C.L. Rev. at 137, 141)—punitive damages were emphatically not permitted in contract actions. See *id.* at 40.<sup>14</sup>

b. The most striking aspect of punitive damage awards during the first 150 years of the nation's history is their size: by modern standards, the awards were remarkably small. The largest punitive damage award that we uncovered in an extensive (although necessarily non-exhaustive) study of nineteenth century law—including punitive awards that were set aside as excessive—was \$4,500.<sup>15</sup> This sum, worth approximately \$58,000 in 1987 dollars, remains quite small by present-day standards when adjusted for inflation. (We used data provided by the Bureau of Labor Statistics' Consumer Price Index to convert the nineteenth century figure into 1987 dollars). Most punitive awards, even those involving serious injuries, were much smaller.<sup>16</sup> Indeed, so far as we were able to determine,

<sup>14</sup> The nineteenth century saw only one significant extension of liability for punitive damages beyond the field of intentional torts: such damages were allowed in actions alleging a breach of duty on the part of common carriers (particularly railroads) and public utilities. Decisions involving such liability, which Dean McCormick believed were related to the punitive damages action for oppressive conduct by public officers (see McCormick, *supra*, 8 N.C.L. Rev. at 138), often themselves involved insult or other aggravating circumstances. And they rested on the understanding that the defendants had assumed special obligations to the public, particularly regarding personal safety. See J. Deering, *The Law of Negligence* § 415 (1886); 2 S. Greenleaf, *supra*, at 263 n.a; T. Sedgwick (9th rev. ed. 1912), *supra*, at § 371a.

<sup>15</sup> *New Orleans, J. & Great N.R.R. v. Hurst*, 36 Miss. 660 (1859).

<sup>16</sup> Many of the reported decisions discussing punitive damages fail to disclose the punitive amounts that were either sought or awarded. It is likely, however, that the larger—and therefore more noteworthy—awards were specified. A listing of those cases noting damage amounts is contained in Appendix A.



the largest nineteenth century awards that combined punitive and compensatory damages was \$20,000. Because that award (and others of similar magnitude) involved a serious injury,<sup>17</sup> the compensatory portion was presumably large.<sup>18</sup> Not only are the reported awards not "excessive" on their face, but the sums were in line with the contemporary fines set by statute for the type of conduct that gave rise to the punitive jury verdicts.<sup>19</sup>

Even these amounts overstate the damages that were awarded for what modern courts would regard as punitive purposes. During the first half of the nineteenth century, damages were generally unavailable as compensation for pain, humiliation and other forms of intangible injury, and consequential damages were restricted as well. See, e.g., T. Sedgwick, *supra*, at 35-37 (1847). As in England, exemplary damages were used during this period to fill the gap. See K. Redden, *supra*, § 2.3(A); Note, *supra*, 70 Harv. L. Rev. at 519-20. Later in the century, the difficulty of measuring the value of interests such as reputation led courts to label as "exemplary" many damage awards that now would be viewed as compensatory.<sup>20</sup> Courts also occasionally awarded nominally

<sup>17</sup> *Caldwell v. New Jersey Steamboat Co.*, 47 N.Y. 282-283 (1872) (award of \$20,000 in combined compensatory and punitive damages to plaintiff passenger who was "maimed and crippled for life" by an exploding steamboat boiler).

<sup>18</sup> Many of the reported decisions identify only the combined total of punitive and compensatory damages. Even so, the numbers involved were notably small. See cases cited at Appendix A.

<sup>19</sup> See, e.g., F. Wharton, *A Treatise on the Criminal Law of the United States* (1852) (citing statutes) (fines for assault and battery ranging from \$500-\$3,000; fines for malicious mischief of up to \$1,000; fines for seduction of up to \$5,000); *New Orleans, J. & Great N.R.R. v. Allbritton*, 38 Miss. 242 (1859) (citing \$10,000 statutory fine for reckless operation of a railroad).

<sup>20</sup> Thus, this Court explained at mid-century that "[i]n many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive

punitive damages to cover the plaintiff's costs of litigation, although this Court in *Day v. Woodworth*, *supra*, disapproved such awards in the federal courts. See McCormick, *supra*, at 148 & n.108; *Linsley v. Bushnell*, 15 Conn. 225 (1842-43).

The size of punitive damage awards did not increase dramatically in the first half of this century. Writing in 1930, Dean McCormick noted what he described as several "startlingly large verdicts of punitive damages"—one for \$50,000, one for \$33,333.33 (reduced to \$10,000), and one for \$12,650 (reduced by \$5000).<sup>21</sup> While these sums certainly were significant amounts of money at the time—the largest was worth some \$332,000 in 1987 dollars, an amount that includes compensatory damages for libel—they would startle no one today. Indeed, in 1955, at the dawn of the modern punitive damages era, an award of \$75,000 was the largest punitive damages verdict in California history and one of the two largest in the history of the United States. Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, Ins. L.J., May 1980, at 257, 259 (1980).

In sum, punitive damages played a relatively small role in this country's legal system through the first half of the twentieth century. Such damages were awarded in limited circumstances, in part for purposes of compensation, and in amounts that were not noteworthy by

rather than compensatory." *Day*, 54 U.S. (13 How.) at 399. See *Huber v. Teuber*, 10 D.C. (3 MacArth.) 484, 498 (1877-79) ("injury done may be aggravated by wanton violation of the rights of others, by malice, or revenge without cause, resulting in a species of injury whose effects can neither be calculated nor compensated"). See generally G. Field, *supra*, at §§ 73-75; 3 J.G. Sutherland, *A Treatise on the Law of Damages*, 726-35 (1883); 2 S. Greenleaf, *supra* at 256-57 n.2; T. Sedgwick, *supra*, at § 353 (9th rev. ed. 1912); T. Street, *supra*, at 480.

<sup>21</sup> McCormick, *supra*, 8 N.C.L. Rev. at 149 & n. 114, citing *Duncan v. Record Publishing Co.*, 145 S.C. 196, 143 S.E. 31 (1927); *Livesley v. Stock*, 281 Pac. 70 (Cal. 1929); *Seaman v. Dexter*, 96 Conn. 334, 114 A. 75 (1921).

the standards of the time. During this period, as commentators have observed, "punitive damage awards proved exceptionally rare" (P. Huber, *supra* at 119) and, when awarded, were modest.

### B. The Frequency And Size Of Punitive Damage Awards Have Exploded In Recent Years

In the past, as we have shown, the award of punitive damages "merited scant attention. Punitive damages were rarely assessed and likely to be small in amount." Ellis, *supra*, 56 S. Cal. L. Rev. at 2. In the last 30 years, however, and particularly since 1970, that situation has changed dramatically. Punitive damages are now awarded with a frequency and in amounts that are without precedent. In part, this development is attributable to changes in the law that have made punitive damages available for the first time in several existing causes of action, and have given those damages a prominent role in new types of lawsuits. The increased availability of punitive damages also is undoubtedly rooted in shifting societal attitudes that have made juries ever more willing to assess ever larger punitive judgments. But whatever the underlying cause, the result has been the development of a regime of punitive damages that is entirely unlike the one that existed throughout almost all of the nation's history.

1. *Changes in Legal Doctrine.* The shifts in the law affecting punitive damages have not been sudden or dramatic. Since 1960, however, there has been an evolution in several areas that, in combination, has had significant consequences.

a. *Contract.* The black letter rule today, as it has been for 200 years, is that punitive damages are not available for breach of contract. See Restatement (Second) of Contracts § 355 (1981). Beginning in the 1960s, however, many courts, led by those in California, have permitted the awarding of punitive damages for the bad faith breach of insurance contracts; punishment has been deemed appropriate for violation of the "covenant of

good faith" that the courts have implied in such contracts. See, e.g., *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 575, 510 P.2d 1032, 1037 (1973). This bad faith action is now allowed "in a majority of jurisdictions." *Punitive Damages: A Constructive Examination*, Report of the Special Committee on Punitive Damages of the American Bar Association Section on Litigation 5-2, 5-3 (1986) (hereinafter as "ABA"). Indeed, "[i]nsurance bad faith litigation has become a field of its own, with numerous treatises and case law reporters." *Id.* at 5-4.

Punitive damage awards for breach of contract are not limited to the insurance area; "a significant minority of jurisdictions have extended the action to other kinds of contract cases." *Id.* at 5-4. Several jurisdictions, for example, have recognized a tort action—and therefore have found punitive damages available—for the breach of consumer contracts.<sup>22</sup> Other states have recognized at least the possibility that a covenant of good faith (for whose violation punitive damages may be awarded) is present in virtually all contracts.<sup>23</sup> See ABA 5-4, 5-5. Taken together, these developments have for the first time given punitive damages a significant role in the field of contracts.<sup>24</sup> Indeed, punitive damages have entered the world

<sup>22</sup> See Comment, *Sailing the Uncharted Seas of Bad Faith: Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 69 Minn. L. Rev. 1161 (1985); Note, *Contort: Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing in Noninsurance Commercial Contracts—Its Existence and Desirability*, 60 Notre Dame L. Rev. 510, 528 n.104 (1985).

<sup>23</sup> See, e.g., *Commercial Cotton Co. v. United California Bank*, 163 Cal. App.3d 511, 209 Cal. Rptr. 551 (1985); *Nicholson v. United Pac. Ins. Co.*, 710 P.2d 1342 (Mont. 1985); *Forty Exchange Co. v. Cohen*, 125 Misc.2d 475, 479 N.Y.S.2d 628, 629-40 (N.Y. Civ. Ct. 1984); *EKE Builders, Inc. v. Quail Bluff Assocs.*, 714 P.2d 604 (Okla. Ct. App. 1985).

<sup>24</sup> See generally J. McCarthy, *Punitive Damages in Bad Faith Cases* (3d ed. 1983); Comment, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 Ind. L. Rev. 668 (1975); Comment, *Bad Faith Revisited: An Examination of Tort Law*



of contract with a vengeance: a Texas jury recently awarded \$350 million in punitive damages in an action growing out of a breach of contract. See Foster Nat. Gas Rep. No. 1702 at 1 (Foster Assocs., Dec. 15, 1988).

b. *Product Liability*. Punitive damages also have entered the relatively new field of product liability. Commentators have noted that punitive awards seem anomalous in actions predicated on negligence or strict liability. See, e.g., Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1140-43 (1984); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 24-28 (1982). Perhaps for that reason, as of 1976, punitive verdicts had been approved on appeal in only three product liability cases. See *id.* at 2-3 n.9, citing *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969); *aff'd*, 46 Ill. 2d 288, 263 N.E. 103 (1970). Since then, however, courts have held punitive damages to be appropriate in the product liability area, and such awards have proliferated.<sup>25</sup>

*Remedies for Commercial Contract Disputes*, 34 Kan. L. Rev. 315 (1985).

<sup>25</sup> See, e.g., *O'Gilvie v. Int'l Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 2014 (1988); *Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Cessna Aircraft Co. v. Fidelity & Casualty Co.*, 616 F. Supp. 671 (D.N.J. 1985); *Stambaugh v. Int'l Harvester Co.*, 102 Ill. 2d 250, 464 N.E.2d 1011 (1984); *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), *pet'n for cert. filed*, 57 U.S.L.W. 3296 (U.S. Oct. 25, 1988); *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. Ct. App. 1986). See generally Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 271 n.6 (1983); Owen, *supra*, 49 U. Chi. L. Rev. at 3 n. 16.

c. *Mass Torts*. Similarly, punitive damages have increasingly found their way into suits for so-called "mass torts." The first tort actions raising punitive damages issues involving a large group of plaintiffs were brought in 1961 to challenge the sale of an anti-cholesterol drug. See Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37, 51-52 (1983); Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 Calif. L. Rev. 116 (1968). Commenting on the novel issues raised by this litigation, which eventually involved over 1500 suits (see Seltzer, *supra*, at 51-52), Judge Friendly warned: "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering . . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967). Indeed, hundreds or thousands of punitive claims may grow out of a single design or manufacturing decision, essentially seeking to punish a defendant repeatedly for the same act. See Jeffries, *A Comment on the Constitutionality of Punitive Damages* 72 Va. L. Rev. 139 (1986).<sup>26</sup> But the courts have nevertheless failed to develop rules that would cabin the award of punitive damages in this sort of litigation, and accordingly the last 20 years have seen a dramatic growth of punitive claims in mass tort cases. See Seltzer, *supra*, at 39-40.

d. *Standard of Liability*. Commentators also have noted other, less tangible changes in the law of punitive damages, particularly in the sort of conduct that is thought to justify an award. Virtually all courts con-

<sup>26</sup> This concern is not hypothetical; two major corporations have been forced to seek the protections of bankruptcy because of the sheer number of punitive damage claims. See *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); *In re A.H. Robins Co.*, 85 B.R. 373 (E.D. Va. 1988).



tinue to insist that punitive awards are appropriate only in cases involving malicious, wanton or reckless conduct. But while "[t]he terminology hasn't changed . . . we've played semantic games with the criteria, with the result that malice has been expanded well beyond the areas in which it commonly arises." *Symposium Discussion, supra*, 56 S. Cal. L. Rev. at 159 (remarks of Prof. Ellis). See *id.* at 160 (remarks of Prof. Wheeler); P. Huber, *supra*, at 128; DuBois, *Punitive Damages: Bonanza or Disaster?* 3 Litigation 35 (1976). Cf. *Smith*, 461 U.S. at 77 n.11 (Rehnquist, J., dissenting). The effects of all of these changes are outlined below.

2. *The Growth in Frequency and Size of Awards.* There can be no doubt that the past 20 years have seen an extraordinary change in the nature of punitive damages. Practitioners and commentators repeatedly note the "drastic,"<sup>27</sup> "dramatic[],"<sup>28</sup> "mind-boggling,"<sup>29</sup> "explosive"<sup>30</sup> increase in the frequency and severity of awards. "[E]normous"<sup>31</sup> and "astronomical"<sup>32</sup> verdicts are observed to be common in settings where, until recently, they would have been "unimaginable"<sup>33</sup> or "inconceivable"<sup>34</sup>; "[t]hey are now dramatically awarded in cases in which liability of any sort would have been al-

<sup>27</sup> Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 Calif. L. Rev. 1433, 1437 (1987).

<sup>28</sup> Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 (1982).

<sup>29</sup> National Association of Independent Insurers, *Punitive Damages and the Civil Justice System* at 5 (1985).

<sup>30</sup> U.S. Tort Policy Working Group, *An Update on the Liability Crisis* (1987).

<sup>31</sup> DuBois, *supra*, 3 Litigation at 35.

<sup>32</sup> Sales & Cole, *supra*, 37 Vand. L. Rev. at 1154.

<sup>33</sup> Schulkin, *Mass Liability and Punitive Damages Overkill*, 30 Hastings L.J. 1797, 1797-1798 n.6 (1979).

<sup>34</sup> Note, *The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishments*, 1984 U. Ill. Rev. 153, 153.

most out of the question merely fifteen years ago."<sup>35</sup> Punitive damages are said in some cases to have gotten "out of hand";<sup>36</sup> one influential commentator who wrote approvingly of punitive damage awards a decade ago has now expressed "concern . . . that large awards of this type are becoming common."<sup>37</sup> While demands for punitive damages "were extremely rare until the 1960's,"<sup>38</sup> they now are described as "routine when the injury is serious and a wealthy institution is numbered among the accused,"<sup>39</sup> and are said to "accompany a substantial part, if not the majority of the claims placed in litigation";<sup>40</sup> indeed, it is now "an anomaly when one sees a complaint which does not seek punitive damages."<sup>41</sup>

The courts themselves have noted the "present-day practice of seeking punitive damages in substantially all damage actions, and what will reasonably be termed the explosion of punitive damage awards." *Rosener v. Sears Roebuck & Co.*, 110 Cal. App. 3d 740, 762, 168 Cal. Rptr. 237, 250 (1980) (Ellington, J., concurring) (emphasis in original), *app. dismissed*, 450 U.S. 1051 (1981). As one court concluded: "judgments for punitive damages are now routinely entered across the nation, and staggering sums have been awarded." *Moore v. Remington Arms Co.*, 100 Ill. App. 3d 1102, 1104, 427 N.E.2d 608, 616-617 (1981).

This impressive body of anecdotal evidence of growth in the size and frequency of punitive awards is supported by the available empirical data. By far the most com-

<sup>35</sup> Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133 (1982).

<sup>36</sup> ABA 1-2.

<sup>37</sup> Owen, *supra*, 49 U. Chi. L. Rev. at 6.

<sup>38</sup> P. Huber, *supra*, at 127.

<sup>39</sup> *Id.*

<sup>40</sup> Morrison, *Punitive Damages and Why the Reinsurer Cares*, 20 The Forum 23 (1984).

<sup>41</sup> Levit, *supra*, at 259. See Jeffries, *supra*, 72 Va. L. Rev. at 143.

prehensive empirical study was one conducted by the RAND Institute for Civil Justice. Peterson, Sharma & Shanley, *Punitive Damages—Empirical Findings* (RAND R-3311-ICJ) 1987 (hereinafter cited as “RAND”). This study reviewed virtually all civil jury trials and verdicts in Cook County, Illinois, and San Francisco County, California, during the period 1960-1984, which it divided into three categories: business tort and contract cases, intentional tort cases, and personal injury cases (including negligence and strict liability actions).<sup>42</sup> The study also reviewed all civil jury trials and verdicts in California for the period 1980-1984. In both of the metropolitan jurisdictions studied over time, the number and amount of awards (measured in constant dollars<sup>43</sup>) “increased substantially.” RAND iii. Because the RAND data are the best available on the issue of how punitive damage awards have changed in modern times, they warrant an extended discussion.

a. *Frequency of Punitive Damage Awards.* The figures produced by the RAND report describing the increased frequency of punitive damage awards are striking. During the entire decade of the 1960s, punitive damages were awarded in only four business cases in Cook County for a total of \$0.31 million, and in only eight such cases in San Francisco for a total of \$0.4 million. For the five years from 1980 through 1984, in contrast, punitive damages were awarded in 23 business cases in Cook County for a total of \$14 million, and in 34 cases in San Francisco for a total of \$17 million. RAND 23-24. During the 1960-1964 period, punitive damages were awarded in two intentional tort cases in Cook County for a total of \$0.01 million; in 1980-1984 they were awarded in 38 Cook County intentional tort

<sup>42</sup> See RAND 4 & n.3. The study considered only 25% of automobile and common carrier cases in Cook County.

<sup>43</sup> All of the dollar figures used in the RAND study are expressed in constant 1984 dollars.

cases for a total of \$13 million. RAND 24-25.<sup>44</sup> In the personal injury area, there were no punitive damage awards in Cook County between 1960 and 1964, while all of the punitive awards from 1965-1980 totalled only \$1.4 million; from 1980 to 1984 there were 14 punitive awards in such cases for a total of \$27 million. RAND 21 table 2.9. Although the totals were smaller, the number of punitive damage awards in personal injury cases also increased in San Francisco: there were six such awards during 1980-1984, compared to one in each of the four preceding five-year periods. *Id.*

The RAND study makes clear that these increases are not a function of a simple growth in the number of suits being filed: the *rate* of awards is itself increasing dramatically. In Cook County from 1960-1964, punitive damages were awarded in only 0.2% of all cases in which compensatory relief was awarded; in 1980-1984, punitive damages were awarded in 3.9% of all suits in which there were compensatory awards—an increase of almost 2000%. The figures in San Francisco are equally dramatic. There, during 1960-1964, punitive damages were awarded in 2% of the actions in which there were compensatory awards; in 1980-1984, San Francisco plaintiffs received punitive damages in 13.6% of the actions in which plaintiffs prevailed—an increase of almost 700%. And the speed of increase is accelerating. The rate of punitive awards almost doubled in Cook County from the late 1970s to the early 1980s, and more than doubled in San Francisco. RAND 9 & table 2.1.

These figures demonstrate that awards of punitive damages, while certainly not the norm, are no longer reserved for exceptional cases. And looking at particular cate-

<sup>44</sup> The rate of punitive awards in intentional tort cases in San Francisco did not change, since “[p]rior to 1980 jurors in San Francisco imposed punitive damages in intentional tort cases far more frequently than did Cook County juries. The increased rate of punitive damages in Cook County during the 1980s merely brought that jurisdiction to the higher rate of San Francisco.” RAND 11; *see id.* at 25.



gories of suits yields even more striking results. In intentional tort cases that produced compensatory relief during 1980-1984, punitive damages were awarded 36% of the time in California and 33% of the time in Cook County. RAND 35 table 3.2. Almost 35% of the California defendants that were found liable for business torts or breach of contract were assessed punitive damages. RAND 35 table 3.2, 46 table 4.3. While punitive damages were awarded at much lower rates in personal injury cases—both in San Francisco and in Cook County during 1980-1984, they were assessed in one to three per cent of the cases in which jurors found liability (RAND 11 table 2.4)<sup>45</sup>—even in personal injury cases punitive liability frequency was increasing. RAND 12.<sup>46</sup>

Other studies, while not conclusive, also point to a significant increase in the frequency of punitive damage awards. A search of Lexis computer files disclosed that the terms "punitive" and "exemplary" damages appeared in 0.007% of all civil cases in 1960 and 0.011% in 1970; the percentage reached 0.19% in 1980. Owen, 49 U. Chi. L. Rev. at 2 n.6. Similarly, as noted above, through 1976 there were only three reported decisions upholding punitive damage awards in product liability cases, all involving verdicts under \$250,000; in contrast, in 1982 alone nine such awards were upheld, all exceeding \$1

<sup>45</sup> These findings are consistent with a study of reported decisions by Judge Posner and Professor Landes, which found that plaintiffs obtained punitive awards in a very small percentage of products liability cases. See Landes & Posner, *New Light on Punitive Damages*, Regulation, Sept.-Oct. 1986 at 33, 34-35, 36.

<sup>46</sup> Professor Priest, who also has reviewed civil verdicts in Cook County, reports that—"punitive damage awards have increased dramatically in recent years." He found that such damages "have been awarded in Cook County now in virtually all areas of civil liability, from street hazard and road construction cases to product liability, malpractice, and landlord-tenant cases. Since the late 1960's, there has occurred a steady increase in the number of punitive damage judgments in business tort and—unusually enough—contract breach cases." Priest, *supra*, at 123.

million. P. Huber, *supra*, at 127. See *Symposium Discussion, supra*, 56 S. Cal. L. Rev. at 160 (remarks of Prof. Wheeler).

Other data confirm the dramatic increase in punitive damage claims. Thus, prior to 1970, only one or two of the hundreds of product liability lawsuits filed against the Ford Motor Company each year sought punitive damages—a rate of less than 0.5%. By 1975, 5.4% of the suits against Ford sought punitive damages; by 1980, the percentage reached 27.1%. Owen, *supra*, 49 U. Chi. L. Rev. at 54 n.258. See P. Huber, *supra*, at 127.

b. *Size of Punitive Damage Awards.* Even more notable than the increase in the frequency of punitive damage awards has been what one survey termed "the extraordinary growth in the size of such awards."<sup>47</sup> Again, the RAND study provides the fullest available picture of this development. Measured in 1984 dollars, the median punitive damage award in Cook County in 1960-1964 was \$1000 and the average \$7000; in 1980-1984, the median had climbed to \$43,000 and the average to \$729,000—an increase of 4300% and 10,000%, respectively. The movement in San Francisco was similar: in 1960-1964 the median punitive damage award was \$17,000 and the average \$166,000; in 1980-1984 the median was \$63,000 and the average \$381,000. RAND 14-15. Indeed, in 1980-1984 the median punitive damage award for California as a whole was \$78,000 and the average \$743,000; the median for Los Angeles County was \$100,000, and the average of the County's 149 punitive damage awards was \$1.3 million. RAND 37 table 3.4.

Looking at particular categories of claims and types of defendants drives home the magnitude of these awards. The median punitive damage award in California bad faith contract actions during 1980-1984 was \$336,000 and the average \$1.6 million. RAND vi-vii. Of the 38

<sup>47</sup> United States Tort Policy Working Group, *An Update on the Liability Crisis* 49 (1987).



punitive damage awards against businesses in Cook County from 1980 through 1984, the median award was \$143,000 and the average \$1.339 million; the median of the 321 punitive damage awards against businesses in California during that period was \$100,000 and the average just under \$1 million. RAND 51 table 4.7.

In reviewing these figures, it is the magnitude of the average award that is remarkable. Most punitive damage awards, of course, remain relatively modest, a fact that is reflected in the size of the median awards. See RAND 17. That being so, however, the average award may approach or exceed \$1 million only if the largest awards are phenomenal in size. And that, in fact, appears to be the case.<sup>48</sup> The RAND study of Cook County, for example, found several extraordinarily large punitive personal injury awards during 1980-1984, which "were something new in personal injury trials . . . . In fact, each of the three largest awards was more than twice the \$1.4 million total of the previous 20 years." RAND 22.

### C. Punitive Damage Awards Are Subject To Review Under The Eighth Amendment And The Award In This Case Was Excessive

1. Viewed from the perspective of history, it is not surprising that an Eighth Amendment challenge to a punitive damage award has only now reached the Court: it is only in recent years that punitive damage awards subject to challenge as constitutionally excessive have been imposed upon defendants. Indeed, no Eighth Amendment claim appears to have been made in the punitive

<sup>48</sup> Of course, the amount awarded by the jury is not necessarily the amount received by the plaintiff; verdicts may be reduced in post-trial proceedings or through settlement. The RAND study, however, found that plaintiffs ultimately receive a large portion—something over 50%—of the punitive damages awarded by juries. RAND 26-30. See Shanley & Peterson, *Posttrial Adjustments to Jury Awards* (RAND R-3511-ICJ 1987) 32. Not surprisingly, the largest awards stand the greatest chance of being reduced by settlement or court action. RAND 26-30.

damages context prior to 1980. But the phenomenon that has caused defendants to ask for some constitutional protection against punitive damages in recent years is illustrated by the facts of this case, which involves a punitive award almost 16 times larger than the next largest reported punitive verdict in the jurisdiction. See *Coty v. Ramsey Associates, Inc.*, 546 A.2d 196 (Vt. 1988), *cert. denied*, 108 S. Ct. 2903 (1988) (\$380,000). Similarly, fines imposed by statute to punish conduct of the sort engaged in by petitioners are dramatically lower than the damages awarded by the jury.<sup>49</sup> As we suggested at the outset, then, there is no novelty in petitioners' constitutional theory; the novelty here lies in the exceptional award under review.

The historical and empirical analyses reveal that neither this nor any other court has made an affirmative determination that punitive damage awards should go unreviewed under the Eighth Amendment or any other constitutional provision. The limited availability and small magnitude of punitive damage awards from 1789 until 1970 gave no serious basis for anyone to claim protection under the Excessive Fines Clause. The historical silence thus indicates that the damages awarded in the past were modest, not that punitive damages were beyond the purview of the Eighth Amendment. Within the past 20 years, however, there have been dramatic changes in the nature of punitive verdicts that have made the issue a serious one for the first time since the Constitution was adopted. In situations involving such change, this Court traditionally has responded by taking a fresh look at the Constitution. "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it

<sup>49</sup> The fines and penalties imposed by Congress and the state legislatures for predatory pricing activity are set out in App. D to the brief of *amici* Motor Vehicle Association of the United States, Inc., *et al.* Virtually all permit only double or treble multiples of the compensatory award.

birth.” *Weems v. United States*, 217 U.S. 349, 373 (1910). History therefore should be no obstacle to a fresh appraisal by this Court of the import of the Eighth Amendment’s ban on excessive fines.

This general principle has particular application for claims based on the Eighth Amendment.<sup>50</sup> The Court has not hesitated to interpret the Cruel and Unusual Punishment Clause, the Excessive Fines Clause’s companion provision, on the basis of contemporary standards and social conditions. As Justice Douglas observed in *Furman v. Georgia*, 408 U.S. 238, 242 (1972), “the Eighth Amendment ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society’” (quoting *Trop v. Dulles*, 356 U.S. 89, 101 (1958)). Thus, while the Court is properly reluctant to find new rights in a 200-year-old document, it has recognized that failure to provide meaningful content to broad phrases will render constitutional protections “little more than good advice.” *Trop v. Dulles*, 356 U.S. at 104. In sum, even though the Eighth Amendment has not heretofore been invoked to place limits on the magnitude of punitive damage awards, the Court “must not, in the guise of ‘judicial restraint,’ abdicate [its] fundamental responsibility to enforce the Bill of Rights.” *Furman v. Georgia*, 408 U.S. at 269 (Brennan, J., concurring).

In our view, extraordinary damage awards like the one involved in this case should be subject to review under the Excessive Fines Clause.<sup>51</sup> That conclusion fol-

<sup>50</sup> Although the Excessive Fines Clause has not been the subject of extensive judicial interpretation, it does share a common heritage with the other two clauses in the Eighth Amendment. See generally *Solem v. Helm*, 463 U.S. 277 (1983). As Justice Field observed, “[t]he whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.” *O’Neil v. Vermont*, 144 U.S. 323, 340 (1892) (Field, J., dissenting).

<sup>51</sup> Petitioners and several other *amici* address at great length the precise meaning of the Excessive Fines Clause as applied to punitive jury awards; repetition of those arguments here is therefore unnecessary.

lows from the Court’s interpretation of the Cruel and Unusual Punishments Clause, which the Court has read to require that a punishment must be proportional to the offense for which it is imposed. See *Solem v. Helm*, 463 U.S. 277, 285 (1983); *Enmund v. Florida*, 458 U.S. 782, 800-801 (1982). The Court also has concluded that unfettered jury discretion in the imposition of punishments is inconsistent with the Eighth Amendment. *Furman v. Georgia*, *supra*; *Lockett v. Ohio*, 438 U.S. 586, 601 (1973) (plurality opinion); *id.* at 622-23 (White, J., dissenting). Yet punitive awards like the one imposed on petitioners fail both of these tests.

The award in this case bore no relationship to the harm inflicted on the plaintiffs or society, or to the gain received by the defendants. There was no effort made to ensure that the punishment fit the offense. Instead, the court of appeals relied exclusively upon the petitioners’ financial status in deciding that the punishment was not “excessive.” But any fair application of a rule of proportionality precludes a court from determining the propriety of a punitive award solely on the basis of a defendant’s financial condition. Neither the deterrent nor the retributive objectives of a system of punitive damages can be promoted by focusing solely upon the size of a defendant’s assets and ignoring factors, such as the amount the defendant expected to gain from the wrongful conduct (if the tort is economic in nature), the injury inflicted upon the plaintiff and the likelihood that the wrongdoer’s misconduct would go unpunished. The failure of the courts below to look past petitioners’ wallets in deciding that millions of dollars should be paid to respondents strongly suggests the severity of the award is wholly unrelated to the severity of the misconduct. At a minimum, the case should be remanded for the courts below to determine whether \$6 million really was a “fitting punishment” in this case.<sup>52</sup>

<sup>52</sup> *Amici* do not contend that the financial condition of a defendant is never a proper consideration in determining the size of a



The award here also violates the second requirement of the Eighth Amendment: that the punishment not be the product of unfettered jury discretion. The instruction to the jury placed no limit on the severity of the punishment it could impose and the jury was specifically invited to consider petitioners' financial standing, which meant that the Vermont jurors were under no constraints in choosing an award that they wanted to be heard in Houston, Texas. A multimillion dollar award rendered under these circumstances should not be permitted to stand in the face of a challenge under the Excessive Fines Clause solely because the defendant has resources sufficient to satisfy the judgment.

In saying this, we do not mean to suggest that many punitive damage awards—or, for that matter, that all of the largest awards—are constitutionally defective. But history teaches that acceptable punitive awards are those that bear some relationship to the offensiveness of the defendant's conduct. Those were the sorts of punitive damage verdicts that were familiar to the Framers of the Constitution, and that survived without constitutional challenge for the better part of two centuries. Massive awards such as the one here, which bear no relation to the defendant's wrong, should not be shielded from scrutiny under the Excessive Fines Clause of the Eighth Amendment.

### CONCLUSION

The judgment of the court of appeals should be reversed.

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punitive damage award. But the courts must be particularly sensitive to this issue when the defendant is a corporation because the burden of the award necessarily falls on the corporation's shareholders. By focusing upon the artificial legal entity, the court necessarily ignores the real impact of an excessive award on those individual shareholders who may not be wealthy at all.

Respectfully submitted,

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## **APPENDICES**

## APPENDIX A

Set out below (listed by state) are nineteenth century decisions that report the size of punitive (as well as combined punitive and compensatory) damage awards. We used data provided by the Bureau of Labor Statistics' Consumer Price Index to convert the nineteenth century figures into 1987 dollars; in reporting the nineteenth century verdicts listed below, we give the real awards followed, in brackets and *italics*, by their December 1987 values.

## Punitive Component Specified:

**Kansas:**

*Southern Kan. Ry. v. Rice*, 38 Kan. 398 (1888) (\$71.75—punitive; \$35—costs & fees; \$10—injury to feelings) [\$918.67—punitive; \$448.13—costs & fees; \$128.04—injury to feelings].

**Minnesota:**

*McCarthy v. Niskern*, 22 Minn. 90 (1875) (\$900) [\$9,428.18].

**Mississippi:**

*New Orleans, J. & Great N.R.R. v. Hurst*, 36 Miss. 660 (1859) (\$4,500) [\$57,616.67].

*New Orleans, J. & Great N.R.R. v. Statham*, 42 Miss. 607 (1869) (\$3,275) [\$28,304.19].

**New Hampshire:**

*Taylor v. Grand Trunk Ry. of Can.*, 48 N.H. 304 (1869) (\$500—actual; \$858.50—exemplary) [\$4,321.25—actual; \$7,419.59—exemplary].

*Woodman v. Nottingham*, 49 N.H. 387 (1870) (\$578—actual; \$100—exemplary) [\$5,258.28—actual; \$909.74—exemplary].

## 2a

*Fay v. Parker*, 53 N.H. 342 (1872) (\$150—actual; \$331.67—exemplary) [\$1,440.42—actual; \$3,184.95—exemplary].

## New Jersey:

*Coryell v. Colbaugh*, 1 N.J.L. 90 (1791) 75 pounds 35 s. 9 d.

## North Carolina:

*Pendleton v. Davis*, 46 N.C. (1 Jones) 98 (1853) (\$100—actual; \$1,000—exemplary) [\$13,828.00—actual; \$1,382.80—exemplary].

## Pennsylvania:

*Pittsburgh, C. & St. L. Ry v. Lyon*, 123 Pa. 140 (1888) (\$200) [\$2,560.74].

## Texas:

*Neill v. Newton*, 24 Tex. 202 (1859) (\$100) [\$1,280.37].

*Dillon v. Rogers*, 36 Tex. 152 (1871-72) (\$100) [\$960.28].

*Bradshaw v. Buchanan*, 50 Tex. 492 (1878) (\$75) [\$894.05].

## Wisconsin:

*Benaway v. Conyne*, 3 Pin. 196 (Wis. 1851) (\$400) [\$5,531.20].

*Hamlin v. Spaulding*, 27 Wis. 360 (1870) (\$100) [\$909.75].

Compensatory & Punitive (where the components are not separated):

## United States:

*Lake Shore & Mich. S. Ry. v. Prentice*, 147 U.S. 101 (1892) (\$6,000) [\$76,822.22].

## 3a

## Arkansas:

*Clark v. Bales*, 15 Ark. 452 (1855) (\$100) [\$1,234.64].

*Barlow v. Lowder*, 35 Ark. 492 (1880) (\$180) [\$2,145.72].

*Kelly v. McDonald*, 39 Ark. 387 (1882) (\$117.53) [\$1,401.04].

*Ward v. Blackwood*, 41 Ark. 295 (1883) (\$2,000) [\$24,692.86].

## California:

*Dorsey v. Manlove*, 14 Cal. 553 (1860) (\$2,000) [\$25,607.41].

*Nightingale v. Scannell*, 18 Cal. 315 (1861) (\$5,000) [\$64,018.52].

*Lyon v. Hancock*, 35 Cal. 372 (1868) (\$1,100) [\$9,506.75].

## Connecticut:

*Edwards v. Beach*, 3 Day 447 (Conn. 1809) (\$50) [\$367.77].

*Dennison v. Hyde*, 6 Conn. 507 (1827) (\$1,200) [\$12,201.18].

*Linsley v. Bushnell*, 15 Conn. 225 (1842) (\$900) [\$10,728.62].

*Dibble v. Morris*, 26 Conn. 416 (1857-58) (\$225) [\$2,777.95].

*Welch v. Durand*, 36 Conn. 183 (1869) (\$200) [\$1,728.50].

*Dalton v. Beers*, 38 Conn. 529 (1871) (\$60) [\$576.17].

## District of Columbia:

*Huber v. Teuber*, 10 D.C. (3 MacArth.) 484 (1877-79) (\$2,500) [\$27,007.81].



**Florida:**

*Florida Ry. & Navigation Co. v. Webster*, 25 Fla. 394 (1889) (\$9,000) [\$115,233.33].

**Georgia:**

*Green v. Southern Express Co.*, 41 Ga. 516 (1871) (10,000) [\$96,007.78].

**Illinois:**

*Schlencker v. Risley*, 4 Ill. 483 (1842) (\$333) [\$3,969.59].

*McNamara v. King*, 7 Ill. 432 (1845) (\$650) [\$8,025.18].

*Chicago W. Div. Ry. v. Hughes*, 87 Ill. 94 (1877) (\$4,500) [\$48,614.06].

*McIntyre v. Sholty*, 121 Ill. 660 (1887) (\$2,500) [\$32,009.26].

**Indiana:**

*Taber v. Hutson*, 5 Ind. 322 (1854) (\$600) [\$7,682.22].

*Nossaman v. Rickert*, 18 Ind. 350 (1862) (\$250) [\$2,880.83].

*Humphries v. Johnson*, 20 Ind. 190 (1863) (\$200) [\$1,868.65].

**Iowa:**

*Frink & Co. v. Coe*, 4 Greene 555 (Iowa 1854) (\$270) [\$3,457.00].

*Brown v. Allen*, 35 Iowa 306 (1872) (\$3,600) [\$34,570.00].

*Milwaukee & St. P. R.R. v. Arms*, 91 U.S. 489 (1875) (from Iowa Circuits) (\$4,000) [\$41,903.03].

*Cameron v. Bryan*, 89 Iowa 214 (1893) (\$1,500) [\$19,205.56].

**Kansas:**

*Sawyer v. Sauer*, 10 Kan. 351 (1872) (\$3,500) [\$33,609.72].

*Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350 (1887) (\$1,000) [\$12,803.70].

**Kentucky:**

*Worford v. Isbel*, 4 Ky. 247 (1808) (\$397.50) [\$2,862.83].

*Maysville & L.R.R. v. Herrick*, 76 Ky. 122 (1877) (\$5,200) [\$56,176.25].

*Louisville & N.R.R. v. Ballard*, 85 Ky. 307, 3 S.W. 530 (1887) (\$3,000) [\$38,411.11].

**Maine:**

*Pike v. Dilling*, 48 Me. 539 (1861) (\$151.25) [\$1,936.56].

*Goddard v. Grand Trunk Ry. of Can.*, 57 Me. 202 (1869) (\$4,850) [\$41,916.13].

*Wilkinson v. Drew*, 75 Me. 360 (1883) (\$170.83) [\$2,109.14].

**Maryland:**

*Mulatto Joan v. Joshua Shield's Lessee*, III Early Maryland Reports 7 (1790) (125 pounds).

*Gaither v. Blowers*, 11 Md. 536 (1857) (\$1,750) [\$21,606.25].

*Schindel v. Schindel*, 12 Md. 108 (1858) (\$629.50) [\$8,369.93].

**Massachusetts:**

*Bodwell v. Osgood*, 3 Pick. 379 (Mass. 1825) (\$1,400) [\$14,234.71].

*Austin v. Wilson*, 4 Cush. 273 (Mass. 1849) (\$30) [\$414.84].

*Ellis v. Brockton Publishing Co.*, 198 Mass. 538 (1908) (\$154) [\$1,971.77].

**Michigan:**

*Lucas v. Michigan Cent. R.R.*, 98 Mich. 1 (1893) (\$1,200) [\$15,364.44].

**Minnesota:**

*Lynd v. Picket*, 7 Minn. 184 (1862) (\$439.59) [\$5,065.54].

**Mississippi:**

*New Orleans, J. & Great N.R.R. v. Allbritton*, 38 Miss. 242 (1859) (\$10,000) [\$128,037.04].

*Whitfield v. Whitfield*, 40 Miss. 352 (1866) (\$6,925) [\$54,408.47].

*Memphis & C. R.R. v. Whitfield*, 44 Miss. 466 (1870) (\$4,500) [\$40,938.16].

**Missouri:**

*Goetz v. Amb's*, 27 Mo. 28 (1858) (\$3,000) [\$39,888.46].

*Kennedy v. North Mo. R.R.*, 36 Mo. 351 (1865) (\$2,000) [\$15,030.43].

*Buckley v. Knapp*, 48 Mo. 152 (1871) (\$5,000) [\$48,013.89].

**New Jersey:**

*Vunck v. Hull*, 3 N.J.L. 165 (1809) (\$400) [\$2,942.13].

*Berry v. Vreeland*, 21 N.J.L. 183 (1 Zabriskie) (1874) (\$300) [\$3,703.93].

**New York:**

*Cook v. Hill*, 5 N.Y. Sup. Ct. 341 (1849) (\$600) [\$3,296.80].

**Ohio:**

*Roberts v. Mason*, 10 Ohio 278 (1859) (\$700) [\$8,962.59].

**Pennsylvania:**

*Roberts v. Swift*, 1 Yeates 209 (Pa. 1793) (720 pounds).

*Dennis v. Barber*, 6 Serg. & Rawle 420 (Pa. 1821) (\$500) [\$4,321.25].

*Porter v. Seiler*, 23 Penn. 424 (1854) (\$2,000) [\$25,607.41].

**Texas:**

*Brooke v. Clark*, 57 Tex. 105 (1882) (\$5,500) [\$65,563.79].

**Vermont:**

*Hoadley v. Watson*, 45 Vt. 289 (1873) (\$200) [\$1,920.56].

**Virginia:**

*Parsons v. Harper*, 16 Gratt 64 (Va. 1860) (\$1,000) [\$12,803.70].

*Borland v. Barrett*, 76 Va. 128 (1882) (\$1,000) [\$11,920.69].

**Wisconsin:**

*Barnes v. Martin*, 15 Wis. 263 (1862) (\$2,000) [\$23,046.67].

*Picket v. Crook*, 20 Wis. 377 (1866) (\$100) [\$785.68].

*Cracker v. Chicago & N.W. Ry.*, 36 Wis. 657 (1875) (\$1,000) [\$10,475.76].

*Meibus v. Dodge*, 38 Wis. 300 (1875) (\$250) [\$2,618.94].

*Bass v. Chicago & N.W. Ry.*, 39 Wis. 636 (1876) (\$4,500) [\$48,614.06].

## APPENDIX B

MEMBERS OF THE  
ASSOCIATION FOR CALIFORNIA TORT REFORM

## ASSOCIATIONS

Associated General Contractors  
of CA  
Assn. of California Life  
Insurance Cos.  
Alliance of American Insurers  
American Insurance Assn.  
Inter-Insurance Exch. of Auto  
Club of Southern California  
California Association of Hos-  
pitals & Health Systems  
California Beer and Wine Whole-  
salers Assn., Inc.  
California Building Industry  
Association  
California Council of Civil  
Engineers/Land Surveyors  
California Council, American In-  
stitute of Architects  
California Fertilizer Association  
California Geotechnical  
Engineers Assn.  
California Jones Company  
California Manufacturers Asso-  
ciation  
California Orthopedic Associa-  
tion  
CA Society of Professional  
Engineers  
California Veterinary Medical  
Assn.  
Co-op of American Physicians  
Consulting Engineers Assn. of  
California  
County Supervisors Assn. of  
California  
Governmental Affairs Council,  
Building Industry Association,  
S. California  
League of California Cities  
National Assn. of Independent  
Insurers  
Osteopathic Physicians & Sur-  
geons of California

Pharmaceutical Manufacturers  
Assn.  
Proprietary Association  
Soil & Foundation Engineers  
Assn.  
Structural Engineers Assn. of  
California  
United Services Auto Association  
Western Liquid Gas Association

## BUSINESSES

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**AMICUS CURIAE**

**BRIEF**



JAN 19 1989

JOSEPH E. SPANIO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
 OCTOBER TERM, 1988

Browning-Ferris Industries of Vermont, Inc. and  
 Browning-Ferris Industries, Inc.,  
*Petitioners,*

v.

Kelco Disposal, Inc., and Joseph Kelley,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE SECOND CIRCUIT

**BRIEF AMICI CURIAE OF THE ALLIANCE OF AMERICAN  
 INSURERS, THE AMERICAN COUNCIL OF LIFE INSURANCE,  
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### QUESTION PRESENTED

In affirming the \$6,000,000 punitive damage award against petitioner, the Court of Appeals did not examine whether this punishment bore any rational relationship to the fulfillment of the retributive and deterrent purposes for which it was purportedly imposed. Rather, that court accepted that such punishments are essentially incapable of any precise determination and justified the award by reference to the wealth of petitioner and the practice in other jurisdictions under which the wealth of a defendant has been used to justify what otherwise would be regarded as exorbitant punishment. Amici will address the following question:

Whether the wealth of a defendant, however measured, may be considered in determining whether a punitive damage award is constitutionally excessive within the meaning of the Excessive Fines Clause.

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**BRIEF AMICI CURIAE OF THE ALLIANCE OF AMERICAN INSURERS, THE AMERICAN COUNCIL OF LIFE INSURANCE, THE AMERICAN INSURANCE ASSOCIATION, THE HEALTH INSURANCE ASSOCIATION OF AMERICA, AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS**

---

**INTEREST OF THE AMICI CURIAE**

The Alliance of American Insurers ("Alliance") is a trade association of approximately 175 insurance companies writing property and casualty insurance throughout the United States. In 1987, member companies of the Alliance had a premium volume accounting for approximately 11% of the property and casualty insurance written in the United States.

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States, representing the interests of 650 member life insurance companies. The ACLI's members currently hold 95% of the life insurance in force in legal reserve life insurance companies in the United States.

The American Insurance Association ("AIA") is a national trade organization representing 195 companies writing property and casualty insurance in every state and jurisdiction of the United States. They are affiliated with 65,000 independent insurance agents nationwide. A substantial portion of the business of AIA's member companies is commercial liability insurance. That coverage enables American businesses to provide the goods, services, jobs and investments vital to the country's economic well being.

The Health Insurance Association of America ("HIAA") represents the interests of 340 member companies which

are responsible for over 85% of the health insurance written by insurance companies in the United States. The combined memberships of the HIAA and the ACLI represent over 90% of the health insurance written by insurance companies in the United States.

The National Association of Independent Insurers ("NAII") is the largest association of property/casualty insurers in the United States. NAII represents over 560 property/casualty insurers. NAII members write over one-third of the personal lines of insurance sold in the United States.

The insurance companies represented by amici have been affected directly and substantially by the explosion in punitive damage awards in the last decade. The courts of many States have authorized punitive damage awards in the relatively new tort action of "bad faith" failure to pay an insurance claim. Although the proponents of the bad faith tort (and other forms of punitive damage actions) attribute to it a broad range of societal goals, the bad faith tort has been recognized by this Court as nothing "more than a way to plead a certain kind of contract violation in tort in order to recover exemplary damages not otherwise available under [state contract] law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 217 (1985). The tort of "bad faith" has been described as the "tortification of contract law," M. Peterson, S. Sarma & M. Shanley, *Punitive Damages* iv (Rand Institute for Civil Justice 1987), under which punitive damages imposed in a civil action rather than a criminal fine imposed in the criminal justice system are employed by the Government, through the court system, to punish and deter conduct perceived to be antisocial.

This new tort has created a large but unpredictable number of contingent liabilities of unlimited scope with respect to insurance claims processed by insurers. Amici's members engage in business through literally millions of contracts. Their calculation of premiums, reserves and

other business risks are based upon their understanding of the general range of exposure they assume under each of these contracts and the actuarial likelihood of claims under each contract. Punitive damage awards add a whole new spectrum of contingent liabilities with unanticipated financial consequences.

The insurance industry is particularly dependent on certainty and predictability in the law. As the Court has observed, the business of insurance

depend[s] on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect.

*Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 721 (1978). Amici believe that their exposure to the enormous uncertainties created by the punitive damage system makes them particularly well situated to assist the Court in addressing the important issues presented by this case.



## INTRODUCTION

The Court granted review in this case to decide whether the Excessive Fines Clause of the Eighth Amendment applies to punitive damage awards rendered by civil juries and, if so, to articulate a test under which the constitutional excessiveness of such awards may be adjudicated in the wide variety of cases in which punitive damages are, or may become, available. Respondents argued in their opposition to the petition that constitutional protections need not be employed in this area of the law because there are already in place adequate controls on the severity of punishment meted out by juries in these cases. *See Br. in Opp.*, at 22-29.

There are a number of responses to such an argument. First and foremost is that the subject of this case is, pure and simple, *punishment*. When the government seeks to punish, the Constitution is virtually always implicated in our system of justice because the ultimate purpose of that document is to preserve freedom "by making the exercise of [governmental] power subject to [its] carefully crafted restraints . . . ." *INS v. Chadha*, 462 U.S. 919, 959 (1983). Where, as here, the States have established mechanisms by which private citizens are authorized to seek, and the courts to impose, punishment, it should not be surprising that the Constitution is implicated. In establishing such mechanisms, the States have placed the power to punish—on behalf of the public—in the hands of private plaintiff/prosecutors whose own monetary recovery is tied directly to the severity of the punishment they seek and the punishment ultimately imposed by the jury. *Cf. Young v. United States ex rel. Vuitton et Fils*, 107 S. Ct. 2124 (1987) (private plaintiffs may not be appointed to prosecute criminal contempt actions against their adversaries because of conflict of interest; public interest to be vindicated in criminal contempt action must be pursued by neutral prosecutor).

Second, any suggestion that existing controls are effectively curbing the severity of punitive damage awards bears a heavy burden of proof. Indeed, in the three cases presently on this Court's docket in which constitutional challenges to punitive damage awards have been raised,<sup>1</sup> punitive damage awards totalling \$24,000,000 have been sustained by the highest state or federal courts involved. Two other cases already brought to the Court's attention and likely to be filed in the near future involve an aggregate sum of \$25,000,000 in punitive damages.<sup>2</sup> No manipulation of statistics can obscure the undeniable significance of these five cases, in which punitive damage awards totalling \$49,000,000 have been affirmed by the lower courts—leaving only this Court to intervene. In them, five defendants—a business found to have attempted to monopolize trade, an entertainment company found to have breached a contract, a manufacturer found not to have lived up to a new standard of conduct announced seven years after the conduct complained of, a corporation found to have artificially depressed the value of its stock to the detriment of minority shareholders, and a salt mine operator found to have allowed salt to escape from its operations—have each suffered an average punitive fine of almost \$10,000,000.

As demonstrated by statistics maintained by the Administrative Office of the United States Courts in a chart

<sup>1</sup> In addition to the case at bar, the cases include *Metromedia, Inc. v. April Enterprises, Inc.*, No. 88-625, *pet. for cert. filed*, Oct. 14, 1988 (\$14,000,000 punitive damage award affirmed by California Court of Appeal), and *The Goodyear Tire & Rubber Co. v. Hodder*, No. 88-626, *pet. for cert. filed*, Oct. 14, 1988 (\$4,000,000 punitive damage award imposed by Supreme Court of Minnesota).

<sup>2</sup> *Eaton Corp. v. The PKL Companies, Inc.*, No. B010958 (Cal. Ct. App. July 18, 1988) (\$15,000,000 punitive damage award affirmed by California Court of Appeal); *Miller v. Cudahy Co.*, No. 87-1502 (10th Cir. Sept. 28, 1988) (\$10,000,000 punitive damage award affirmed by Tenth Circuit).

that has been lodged with the Clerk by amici, a total of 31,801 fines were imposed in federal criminal cases between July 1, 1986, and June 30, 1987, in an aggregate amount of \$116,337,875—an average fine of less than \$4,000 per defendant. The plaintiffs in the five punitive damage cases mentioned above stand to enrich their personal coffers with a windfall constituting over 42% of the total federal criminal fines imposed over a recent one-year period. Those federal fines are, of course, imposed on behalf of, and are collectable by, the people of the United States. Those fines are imposed and collected in cases brought by public servants whose first duty is to see that the ends of justice are served.<sup>3</sup> No system of measured, rational justice could reach such a bizarre result in which private prosecutors in a few cases collect such a remarkable bounty.

Third, the purported “controls” over the imposition of punitive damage awards need merely to be described to

<sup>3</sup> The typical response to such statistics by plaintiffs about to be enriched by the largesse of unfettered juries is that the fines imposed in criminal cases cannot be viewed in isolation because many criminal cases also involve incarceration or other restraints on liberty. That response is beside the point. The four States whose substantive law governs the five punitive damage cases at issue presumptively could have criminalized the conduct involved and prosecuted the persons responsible for that conduct. The fact that they chose either not to criminalize that conduct or not to prosecute the “guilty” parties for their commission of that conduct hardly supports the proposition that those States are therefore free to unleash bounty hunters licensed to extract unlimited fines from the suspects. Indeed, the most obvious conclusion to draw from this situation is that the conduct engaged in by the defendants in those cases was not so harmful to society as to warrant resort to the criminal process. In any event, the Excessive Fines Clause of the Eighth Amendment is surely not rendered inoperative because a State has chosen not to utilize incarceration as a tool to punish those thought to have harmed the public by their conduct—the logical result of the plaintiffs’ typical argument. Indeed, under this line of reasoning a State could impose a limitless fine on a convicted person or corporation free from any constraint of the Excessive Fines Clause solely by eschewing the use of incarceration.

be eliminated from any serious consideration as adequate substitutes for a rule derived from the plain language of the Excessive Fines Clause and the principle of proportionality it took directly from Magna Carta. As the court below in this case recognized, “Vermont law . . . invests a jury with enormous discretion . . . [and] views punitive damage awards as ‘incapable of precise determination.’” Pet. Cert. App., 10a, 845 F.2d, at 409 (citations omitted). Further, under Vermont law a punitive damage award will be disturbed by a court “only if it is ‘manifestly and grossly excessive.’” *Id.*, at 10a-11a, 845 F.2d, at 410 (citations omitted).

These rhetorical reins over the passions and prejudices of Vermont jurors, who may, as all other jurors, often be expected to utilize punitive damages to punish unpopular defendants, see *Electrical Workers v. Foust*, 442 U.S. 42, 50-51 n.14 (1979), are mirrored elsewhere by “rules” that would be attributed to the satirical genius of an Alexander Pope but for the fact that they constitute official government policy. Under them, severe punishments are meted out almost as if the defendants were not really obliged to pay the judgments. Thus, the Supreme Court of Nevada—in an express effort to rationalize appellate control over the size of punitive damage awards assessed by Nevada juries—recently decreed that the ultimate determination of the size of these punishments depends on “what is fair and just and reasonable according to the sense [of right and wrong] most of us possess from childhood.” *Ace Truck & Equipment Rentals, Inc. v. Kahn*, 746 P.2d 132, 137 (1987).

Under this standard, noteworthy only for the candor in its articulation, the Supreme Court of Nevada recently reinstated a \$5,939,500 punitive damage award against an insurance company in a “bad faith” case, holding that that punishment “does not shock our judicial conscience . . .” *Ainsworth v. Combined Insurance Co. of America*, 763 P.2d 673, 677 (1988), *pet. for reh’g pending*. Perhaps taking that



cue, a Nevada trial court refused to disturb a \$22,500,000 punitive damage award in another insurance "bad faith" case based upon its observation that the jury "knew that a substantial sum was necessary to deter further conduct by a wealthy, powerful and impersonal corporation." *Hires v. Republic Insurance Co.*, No. 87-2917 (2d Jud. Dist. Nev. Aug. 31, 1988) (unpublished order, at 2-3), *pending on appeal*, No. 19426 (Nev. Sup. Ct.). How the jury "knew" that such an enormous punishment was required is not explained by the trial court.<sup>4</sup>

Given the foregoing characteristics of the punitive damage system, it would be surprising if that system did *not* produce excessive punishments "based upon the caprice and prejudice of jurors." *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). The Court has the opportunity in the case at bar to recognize and implement a limiting principle under which the passions and prejudices of jurors may be constrained under an even-handed, objective and easily administered rule based upon the proportionality requirement of the Eighth Amendment. Applying this Court's decision in *Solem v. Helm*, 463 U.S. 277 (1983), proportionality under

<sup>4</sup> The actual basis upon which the \$22,500,000 punitive damage award against the defendant was calculated by the jury illustrates other constitutional problems associated with the punitive damage system. Roughly 98% of that award was imposed to punish misconduct allegedly committed by Republic Insurance Company outside the State of Nevada in transactions having no contact with Nevada and in some States that do not allow the recovery of punitive damages for "bad faith" failure to pay an insurance claim. *See* Br. of American Insurance Association, *et al.*, in *Republic Insurance Co. v. Hires*, No. 19426 (Sup. Ct. Nev.), filed December 23, 1988. That attempt by Nevada to punish conduct occurring within, and to project its substantive law of bad faith beyond, its borders would seem to violate the Due Process Clause under decisions of this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978). This punishment for conduct outside of Nevada did not, of course, extinguish the rights of potential plaintiffs in those States from bringing their own actions to punish Republic in the same duplicative fashion.

the Excessive Fines Clause should be measured by looking to the following objective factors: 1) the gravity of the offense and the harshness of the punitive damage award; 2) the monetary penalties authorized by the State's legislature for the same or similar conduct; and 3) the monetary penalties authorized by other States for the same or similar conduct. In the balance of this brief, however, amici will address the startling proposition, implicitly endorsed by the courts below in this case and by other courts, that a punitive damage award may be regarded as reasonable—and, by a parity of reasoning, as constitutional under the Excessive Fines Clause—so long as it may be characterized as comprising only some relatively small percentage of the defendant's "wealth."

#### SUMMARY OF ARGUMENT

The principle that persons of great means and persons of modest means stand on equal footing in the courts of this Nation is firmly engrained and, in many of its aspects, constitutionally required. This Court, as well as many other courts and commentators, have recognized from time to time the inherently prejudicial nature of evidence of wealth, acknowledging that evidence of substantial wealth may corruptly influence both a finding of liability and the amount of damages awarded. Yet many courts, having no better basis upon which to rationalize the size of punitive damage awards, allow evidence of a defendant's wealth to be introduced into punitive damage cases: juries are told that wealthy corporations not only may, but should be punished more severely than persons of lesser wealth who may have engaged in precisely the same wrongdoing causing precisely the same injury to the public interest that punitive damages are designed to serve.

This discordant, purposeful discrimination itself raises constitutional questions. The question presented by the case at bar, however, is whether the status of the petitioners—their financial position—may appropriately



be offered as a constitutional justification for the \$6,000,000 punitive damage award imposed against them. The court below strongly suggested that the proportionality principle of the Excessive Fines Clause is satisfied so long as the punishment inflicted confiscates from the defendant some uncertain but "reasonable" percentage of the defendant's wealth as measured by some uncertain yardstick. By this argument, the court below and respondents would attempt to convert a constitutionally suspect practice into a constitutionally acceptable means for determining excessiveness under the Eighth Amendment.

This attempt must be rejected for a number of independently sufficient reasons. First, the use of wealth as a means of measuring excessiveness under the Eighth Amendment would be a perversion of the historical roots of the Excessive Fines Clause, which may be traced directly to an almost identical provision in the English Bill of Rights of 1689 and from there to the amercement clauses of Magna Carta. Under those provisions of the English Constitution, wealth was relevant only in mitigation of maximum punishments that had been established not by inflamed jurors on a case-by-case basis but in advance by custom, ordinances and statutes that made no discrimination on the basis of wealth.

Second, there is no agreement among the courts that have embraced the use of wealth in punitive damage cases as to how wealth might be measured for constitutional purposes. Nor has any court ever articulated what percentage of a defendant's wealth would, if imposed as a punitive damage award, be constitutionally excessive. Neither the methodology nor the percentage can be found in the Excessive Fines Clause. If either could be divined from the text of that Clause, their use would be fundamentally antithetical to the purposes of that Clause.

Finally, members of this Court and other distinguished experts have concluded that the assessment of punitive

damages based upon the wealth of a defendant—especially a corporate defendant—actually retards, rather than advances, the retributive and deterrent purposes served by such punishment. In short, the introduction of wealth into the proportionality inquiry under the Eighth Amendment would undermine the very objectives that the proponents of a wealth test profess to embrace. For all of these reasons, or indeed, any one of them, the Court should reject the argument that petitioners and defendants in other punitive damage cases may be punished according to their wealth.

## ARGUMENT

### I

#### EVIDENCE OF THE WEALTH OF THE DEFENDANT INEVITABLY AROUSES THE PASSIONS AND PREJUDICES OF JURORS AND DOES NOT FURTHER THE PURPOSES OF PUNITIVE DAMAGE AWARDS

As the Court has observed, "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded . . . ." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (footnote omitted).<sup>5</sup> Prior to the availability of the punitive damages remedy in American common law, American courts rarely allowed the introduction of evidence of a defendant's wealth. Such evidence was admitted in only a few types of cases in which it was viewed as having

<sup>5</sup> Amici do not argue here that placing the wealth of a defendant before the jury prior to a determination of liability would necessarily deprive that defendant of its right under the Due Process Clause of the Fourteenth Amendment to a determination of its liability by an unbiased factfinder. *Cf. Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). Amici likewise do not address here the related question whether due process precludes the States from permitting jurors, as a matter of state law, to take into account the wealth of a defendant in arriving at a sum to be imposed as punitive damages.

unique relevance.<sup>6</sup> The defendant's wealth was deemed irrelevant to the degree of the plaintiff's injury in most cases and therefore irrelevant to the amount of damages necessary to compensate the plaintiff. However, as courts began to allow juries to assess punitive—rather than compensatory—damages, they began to allow evidence of the defendant's wealth to be admitted under the theory that such evidence was relevant to the amount of damages necessary to punish the defendant (or make the defendant "smart" from the award).<sup>7</sup> In what appears to be a relatively recent development, courts have purported to derive from this rule of evidence a crude method of gauging the excessiveness of a punitive damage award by comparing the award to the wealth of the defendant.

The evidentiary rule that evidence of the defendant's wealth is admissible to demonstrate what punishment would be appropriate has a checkered history. Courts traditionally resisted the idea that wealth should play any role in the assessment of damages. For example, the New York Court of Appeals in 1899 articulated its grave concerns about the use of evidence of wealth before a jury as follows:

It has ever been the theory of our government and a cardinal principle of our jurisprudence that the rich and poor stand alike in courts of justice, and that neither the wealth of the one nor the

<sup>6</sup> See, e.g., *Guengerech v. Smith*, 34 Iowa 348, 349 (1872) (listing slander and breach of promise to marry as the two established exceptions).

<sup>7</sup> E.g., *Suzore v. Rutherford*, 251 S.W.2d 129, 131 (Tenn. App. 1952) ("what would be 'smart money' to a poor man would not be, and would not serve as a deterrent, to a rich man"). While this logic is accepted by most courts, it should be viewed as the product of a questionable general principle of punishment theory. For example, if applied in determining the appropriate period of incarceration, this principle would seemingly require young offenders—who are "wealthy" in years—to be incarcerated for a longer period of time than old offenders.

poverty of the other shall be permitted to affect the administration of the law. Evidence of the wealth of a party is never admissible, directly or otherwise, unless in those exceptional cases where position or wealth is necessarily involved in determining the damages sustained.

*Laidlaw v. Sage*, 158 N.Y. 73, 103 (1899).<sup>8</sup>

In that same year, this Court was confronted with this practice in a case that illustrates the Court's well-founded concern regarding the prejudicial impact of such evidence when placed before a jury. In *Washington Gas Light Co. v. Lansden*, 172 U.S. 534 (1899), a corporation and several individuals had been sued for libel. During trial, evidence of the wealth of the corporation was introduced, over the objections of the defendants, as being relevant to the determination of any punitive damages to which the plaintiff might prove himself to be entitled as a matter of state (District of Columbia) law. Under governing procedure, the

<sup>8</sup> In an earlier New York case the use of wealth had been rejected with the observation:

It is often argued that a small verdict will be no punishment to a man of wealth. This may or may not be so. Men of wealth are quite apt to value and appreciate property as highly as those in moderate circumstances. Such argument is, in my opinion, speculation. . . .

*Palmer v. Haskins*, 28 Barb. 90, 92 (Sup. Ct. N.Y. 1858). Although the New York courts eventually came to permit the introduction of evidence of wealth into punitive damage cases, some of that state's courts have established elaborate procedures to prevent the abusive use of such evidence and to prevent its infecting the jury's determination of liability on the underlying claim or liability for punitive damages by precluding its admission prior to those findings. See *Rupert v. Sellers*, 48 App. Div. 265, 368 N.Y.S.2d 904 (1975). Although amici do not explore the question more fully here, it appears obvious that such insulation of the jury may be required by due process if wealth is to be held relevant to the determination of excessiveness under the Excessive Fines Clause.



jury was instructed that it could return only a single verdict, for which all defendants would be jointly and severally liable. *Id.*, at 552. The jury returned a verdict of \$12,500 against all defendants on the basis of instructions that, *inter alia*, precluded it from awarding punitive damages. The jury was not, however, expressly instructed by the trial court that it had to disregard the evidence of the corporation's wealth that had been placed before it.

On writ of error to this Court, the verdict was reversed as to the corporation and all but one of the individual defendants. The Court then confronted the question whether the verdict could stand against the remaining defendant in light of the fact that evidence of the wealth of the corporation had been placed before the jury. The plaintiff in error argued that the verdict could stand because the jury had been precluded from awarding punitive damages. The Court, noting that the trial court "did not . . . plainly limit the jury to its consideration" of the evidence of wealth to the issue of punitive damages, held that the mere possibility that such evidence might have infected the award of compensatory damages required reversal and a new trial even though the defendants "did not in so many words ask the court to withdraw the evidence from the jury." *Id.*, at 554. As the Court held, to let the verdict stand in such circumstances "might work injustice . . ." *Id.*, at 556.

Although the Court rarely has occasion to act essentially as the highest court of a State by deciding evidentiary questions lacking any evident constitutional dimension (such as those presented in *Washington Gas Light*), the Court's sensitivity in that case to the potentially prejudicial impact of putting the wealth of a defendant before a jury possessing broad discretion to impose virtually any sum for punitive and compensatory damages<sup>9</sup> has manifested itself

<sup>9</sup> In *Washington Gas Light*, the Court indicated that the largely

in other cases. In *City of Newport v. Fact Concerts, Inc.*, *supra*, the Court held that punitive damages were not recoverable against a municipality in a suit brought under 42 U.S.C. § 1983 because juries in such cases—even without the introduction of evidence of the defendant's wealth—would be aware of "the unlimited taxing power of a municipality." 453 U.S., at 270. The Court observed that such awareness "may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award." *Id.* Because "the impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial," the Court held that there was no "compelling reason" to visit such awards on municipalities in § 1983 cases. *Id.*, at 270-71. Thus, as the law presently stands, municipalities may not be punished for the most flagrant violations of constitutional rights (although their officials may be), while insurance companies may suffer severe punishment for the failure to process correctly a single one of the millions of claims they process each year.

The judicial sensitivity and common sense exhibited in *Washington Gas Light* and *Fact Concerts* parallels the stringent and unanswered criticism of the use of the defendant's wealth in punitive damage cases voiced by Professor Morris well before the explosion of such cases in the last few decades:

The theory is that a penalty which would be sufficient to reform a poor man is likely to make little impression on a rich one; and therefore the richer the defendant is the larger the punitive damage award should be. But it is probable that this very evidence, instead of aiding the jury to assess a proper verdict, may prejudice them against the defendant and prevent an impartial

unfettered discretion of a jury to award almost any sum as compensatory damages in a case involving "injury to feelings" was a factor in its treatment of the question it decided. 172 U.S., at 555.



judgment, not only on the size of the verdict, but in deciding who shall win the case. It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare. Such evidence may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function.

Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931). Other commentators have echoed Professor Morris's observations. See, e.g., K. Redden, *Punitive Damages* § 3.5(c)(2), at 61 (1980) (noting that "the emotionally prejudicial nature of the evidence must be considered"); Sales & Cole, *Punitive Damages: A Relic that Has Outlived its Origins*, 37 Vand. L. Rev. 1117, 1148 (1984) (the "emotion provoking nature of [such] evidence . . . undoubtedly influences juries to award punitive damages in excess of any rational amount"); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 528 (1957) ("The emotionally prejudicial nature of such evidence creates a problem."); Note, *Damages—Considering the Wealth of the Defendant in Giving Punitive or Exemplary Damages*, 3 Baylor L. Rev. 436, 441 (1951) ("The resulting confluence of highly prejudicial and inflammatory evidence hinders the jury more than it helps them in justly determining the outcome of the case.").<sup>10</sup> In fact, the United States Department of Justice Tort Policy Working Group has concluded that a plaintiff's punitive damage "claim may be useful for no other purpose than to obtain a higher compensatory damage award from the jury by highlighting the defendant's 'deep pocket.'" United States Department

<sup>10</sup> The prejudicial impact of such evidence is compounded where courts allow the introduction of evidence of the plaintiff's poor social and financial status. See, e.g., *Boice v. Bradley Mining Co.*, 92 F. Supp. 750, 753 (S.D. Idaho 1950), *aff'd*, 194 F.2d 80 (9th Cir. 1951), *cert. denied*, 343 U.S. 941 (1952).

of Justice Tort Policy Working Group, *An Update on the Liability Crisis* 50 (March 1987).

These observations recently have been confirmed, albeit tentatively, in a discussion draft of organizational sentencing guidelines prepared by the staff of the United States Sentencing Commission. In that draft, the use of an organization's size or financial condition is rejected as a principal measure of punishment:

The size of an organization may affect the scope of criminal activity and thereby the amount of offense loss, and size or financial resources may affect an organization's ability to pay a loss-based penalty. However, large organizational size alone does not necessarily render an offense more harmful in terms of loss or detectability, and is neither prohibited nor disfavored by the law in general. As with gain, penalties based primarily on size would distort the central focus of the criminal law on harmful effects.

United States Sentencing Commission, *Discussion Draft of Sentencing Guidelines and Policy Statements for Organizations: Proposed Chapter Eight for Guidelines Manual* 8.2 (July 1988).<sup>11</sup>

<sup>11</sup> This document has not been adopted by the Sentencing Commission and was published "for discussion purposes only." In a staff working paper distributed along with the draft guidelines referred to in the text above, it is concluded that the assessment of punishment based upon an organization's size or wealth "capriciously overdeters and underdeters offenses by giving the less wealthy incentives to commit more harmful offenses, and vice-versa. Nor is there any necessary correlation between a person's wealth and the harmfulness of the offense committed." United States Sentencing Commission, *Staff Working Paper: Criminal Sentencing Policy for Organizations* 36 n.152 (May 1988). See also *Wilson v. Onondaga Radio Corp.*, 175 Misc. 389, 391, 23 N.Y.S.2d 654, 656 (Sup. Ct. 1940) ("To measure punitive or exemplary damages by the wealth of the defendant seems far fetched. As well might the State impose a fine in a criminal case in accordance with the defendant's ability to pay.").

On the basis of this Court's statements regarding the potentially prejudicial impact on the jury of evidence of wealth of the defendant<sup>12</sup> and the highly questionable relevance of such information to the functioning of a rational system of retribution and deterrence, this Court should view with considerable skepticism the assertion that the punitive damage award in this case is of no constitutional concern because it represents only a fraction of petitioner's "wealth." The use of wealth as a criterion in addressing the constitutional excessiveness of a punitive damage award is also inconsistent with the history of the Excessive Fines Clause and contrary to the establishment of an even-handed, reliable and easily administered test for excessiveness under that Clause.

## II

### THE WEALTH OF THE DEFENDANT IS IRRELEVANT TO A DETERMINATION OF EXCESSIVENESS UNDER THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT

If the State of Vermont enacted a criminal statute providing that persons with incomes or net worth in excess

<sup>12</sup> The doubtful ability of juries to deal with wealth in such a way as to avoid infecting the factfinding process has led the American Bar Association to conclude that the use of the jury in the process of imposing a sentence or punishment is a prescription for inconsistency and irrationality in the criminal context. ABA *Standards for Criminal Justice*, Standard 18-1.1 *Commentary* (2d ed. 1980). Amici submit that if there is a difference between imposing a fine in a criminal case and a punitive damage award in a civil case for these purposes, it is that at least in criminal cases the sentencing authority is bound by an upper limit imposed by the legislature. If juries are inappropriate to mete out punishment to convicted criminals, it is *a fortiori* that this responsibility should not fall on them in punitive damage cases absent the most stringent controls. See Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 *Hastings L.J.* 639, 664 (1980); Comment, *Pretrial Discovery of Net Worth in Punitive Damages Cases*, 54 *S. Cal. L. Rev.* 1141, 1161 (1981).

of a specified figure were subject to incarceration for 10 years and a fine of \$6,000,000 for engaging in monopolistic practices within Vermont, and that persons with lesser income or net worth were subject to significantly lesser punishments, that statute would raise grave questions under this Court's decisions that forbid the drawing of distinctions within the criminal justice system based upon wealth or other "status." As the Court stated in *Furman v. Georgia*, 408 U.S. 238, 256 (1971) (per curiam), "A law that stated that anyone making more than \$50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that . . . those who made less than \$3,000 a year, or those who were unpopular or unstable should be the only people executed." See, e.g., *Robinson v. California*, 370 U.S. 660 (1962) (punishment of "status" held unconstitutional). See also *Powell v. Texas*, 392 U.S. 514 (1968) (punishment can only be inflicted on the basis of the defendant's wrongful acts or behavior, not on the basis of status); *id.* at 543 ("Punishment for a status is particularly obnoxious . . .") (Black, J., concurring); *Person v. Ohio*, No. 87-6116, 57 U.S.L.W. 4020 (U.S. Nov. 29, 1988) (reaffirming right of indigent defendant to effective counsel on first appeal from conviction).<sup>13</sup>

Given the constitutionally suspect nature of such discrimination, it seems evident that the Vermont legislature would be required to make detailed findings demonstrating a compelling interest in order to sustain the use of wealth

<sup>13</sup> Resort to various measurements of wealth to rationalize the imposition of an enormous punitive damage award raises other serious constitutional problems. For example, a State may not constitutionally impose a tax on the total net income of a foreign corporation. It may only tax income proportionate to the economic activity of that foreign corporation within its borders. See, e.g., *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 273 (1978). If, as *Moorman* holds, the Due Process Clause prohibits the States from taxing on this basis, it is quite unlikely that due process would permit the States to inflict punishment on this basis.



as a basis for punishing some persons or corporations more harshly than others. The Vermont legislature has not done so; instead, the court below relied upon the law of Vermont as established by the Supreme Court of Vermont. That court has, in turn, apparently adopted the use of wealth in this context in the course of following what this Court recognized in *City of Newport v. Fact Concerts, Inc.*, *supra*, 453 U.S., at 270 & n.31 as "tradition" in this area.

Resolution of the question in the case at bar, however, does not turn on the constitutionality of this "tradition." In the decision below appears a statement—devoid of any express analysis—that the \$6,000,000 punitive damage award was not "so disproportionate" as to be constitutionally excessive. Although the Second Circuit does not expressly identify the object of the comparison it purports to make, its intense focus on the wealth of petitioner prior to that statement suggests that it regarded the relationship between petitioners' wealth and the size of the award as not being "disproportionate" in the constitutional sense and that, therefore, the proportionality requirement of the Excessive Fines Clause was satisfied. Pet. Cert. App., at 11a-12a, 845 F.2d, at 410. That suggestion is without merit.

#### A. The History of the Eighth Amendment Does Not Countenance Reference to Wealth as a Basis for Imposing a Higher Punitive Damage Award

Although defendants have not had occasion to interpose the Excessive Fines Clause against excessive punitive damage awards until the recent proliferation of such awards, thus providing courts with few opportunities to interpret the Clause, the history of the antecedents of that Clause establish that wealth entered into the assessment of amercements—the functional equivalent of punitive damage awards—in only two ways. Neither is consistent with the use of wealth as occurred in this case.<sup>14</sup>

<sup>14</sup> The historical antecedents of the Excessive Fines Clause are elab-

Chapter 20 of Magna Carta was inserted in that document to protect Englishmen against exorbitant punitive fines imposed against persons who, in committing various torts or otherwise violating the laws, were also assumed to have committed an offense against the public for which punishment was warranted.<sup>15</sup> Under Chapter 20, persons could only be amerced or fined in accordance with the "degree" or "gravity" of the offense. As the amercement system evolved after 1215, the maximum potential amercement for any particular offense generally became established by custom, statute or local ordinance, threepence being a common amercement for petty offenses.<sup>16</sup> At the time the principles of Chapter 20 were incorporated into Article 10 of the English Declaration of Rights of 1689, the drafters of that document intended to ban all punishments not specifically authorized by statute.<sup>17</sup>

Chapter 20 expressly provided that an amercement could not be imposed—even if it were proportionate to the offense—if the effect would be to destroy a person's "contentment"—the means of functioning productively in society. To this extent, Chapter 20 took wealth into account by ensuring that a person's economic viability would not be destroyed by an amercement no matter what his offense might be.<sup>18</sup> Thus, in this aspect Chapter 20 operated to *preserve* "wealth."

Chapter 20 also provided that amercements could not be imposed "except by the oath of honest men of the neighbourhood." The practice under this provision illumi-

orated upon in more detail in the brief of amici Golden Rule Insurance Co., *et al.*

<sup>15</sup> Br. of Golden Rule Insurance Co., *et. al.*, as *Amici Curiae*, at 8-14.

<sup>16</sup> *Id.*, at 10 & 13.

<sup>17</sup> *Id.*, at 19.

<sup>18</sup> *Id.*, at 10-11, 13-14.



nates the use to which wealth might be put under Magna Carta and therefore sheds light directly on the problem at hand. Under this early version of the "jury" system, the "honest men of the neighbourhood" were not involved at all in determining "guilt" or "innocence." Rather, after the court involved had proposed maximum amercements to be imposed on "defendants"—based for the most part on pre-established limits as noted above—the jurors determined whether the poverty or poor financial circumstances of the person to be fined indicated that a fine less than the maximum, or indeed no fine at all, should finally be assessed.<sup>19</sup>

It is clear then that under Chapter 20 of Magna Carta and Article 10 of the English Declaration of Rights of 1689, both of which were carried into various colonial charters and then into state constitutions prior to the latter's virtually verbatim inclusion in the Eighth Amendment,<sup>20</sup> wealth was not regarded as a basis for increasing punishment. In contrast to the punitive damage system of today, the function of jurors, untainted by involvement in the resolution of merits of the underlying dispute, was to act as a buffer against any court that imposed a particularly harsh amercement. Indeed, an amercement that a judge attempted finally to assess without a jury would be set aside on that ground.<sup>21</sup>

The history of Magna Carta and the English Bill of Rights of 1689 is not neutral on this point; if, as this Court held in *Solem v. Helm*, 463 U.S. 277 (1983), persons in this Nation are entitled to at least the same right to be free from excessive punishments as were the English, *id.* at 286, the suggestion that the Excessive Fines Clause would be satisfied by some reasonable proportionality be-

<sup>19</sup> *Id.*, at 9-11.

<sup>20</sup> *Id.*, at 21-28.

<sup>21</sup> *Id.*, at 14-16.

tween a punitive damage award and the "wealth" of the defendant must be rejected as flatly inconsistent with practice under the English Constitution.

#### **B. There Is No Basis for Determining the Constitutional "Wealth" of a Defendant Under the Suggested Standard**

The court below was uncertain as to how petitioners' wealth was to be measured for purposes of applying its "proportionality" test. Thus, it focused alternatively on the proportionality between the punitive damage award and petitioners' annual revenue, net worth, and net income for a particular fiscal year. Pet. Cert. App., at 11a, 845 F.2d, at 410.

Other courts embracing the "wealth" test have searched for different ways of capturing the concept of wealth. For example, in *Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073, *cert. denied*, 108 S. Ct. 212, *reh'g denied*, 108 S. Ct. 477 (1987), the Supreme Court of Arizona satisfied itself that a \$3,500,000 punitive damage award was not excessive because it represented, alternatively, 3.5 days of Allstate's net income or 1/25 of 1% of Allstate's total assets. *Id.*, at 1084-85.<sup>22</sup> Other state courts have calculated the "wealth" of a defendant in a host of different ways,<sup>23</sup>

<sup>22</sup> Haphazard definitions of "wealth"—such as "gross revenue"—are particularly troublesome in the context of the insurance industry, where an overwhelming percentage of the funds taken in by insurers must be committed to reserves to meet obligations to policyholders and their beneficiaries. See, e.g., *Life Insurance Fact Book* 69-72 (American Council of Life Insurance 1988). Cf. *Los Angeles Department of Water & Power v. Manhart*, *supra*, 435 U.S., at 721.

<sup>23</sup> See, e.g., *Acheson v. Shafter*, 107 Ariz. 576, 490 P.2d 832 (1971) (5% of net worth upheld); *Moore v. American United Life Insurance Co.*, 150 Cal. App. 3d 610, 197 Cal. Rptr. 878 (1984) (3.4 weeks of defendant's income and 3.2% of net assets upheld); *Wetherbee v. United Insurance Co.*, 18 Cal. App. 3d 266, 271, 95 Cal. Rptr. 678, 681 (1971) (one week's after-tax earnings upheld); *Wiener v. S.S. Kresge Co.*, 465 S.W.2d 666, 670 (Mo. App. 1971) (considering net income, net worth, and gross sales for two years).

and some allow jurors simply to rely on evidence of the defendant's "reputed" wealth. See K. Redden, *supra*, at 61.

There is no constitutional basis for selecting among these methods to determine wealth. In addition, assuming some methodology could be identified that would produce reliable and consistent results in calculating the wealth of punitive damage defendants, it seems inconceivable that there would be any basis for this Court's determining what percentage of that wealth would be too great a fine to impose under the Excessive Fines Clause. The decisions of lower courts add little to the inquiry.<sup>24</sup> It is true that the Court engages in difficult line drawing in Eighth Amendment cases. See *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (Cruel and Unusual Punishments Clause prohibits execution of youth who committed capital crime six days short of his sixteenth birthday). It is, however, difficult to imagine that a constitutional line could be drawn in this context, especially given the lack of historical or analytic support for the drawing of such a line.

Furthermore, such an arbitrary limit would produce equally arbitrary results. For example, under a 2% net worth test, a company worth \$1 billion would be subject to punitive damage awards of up to \$20,000,000 in every case in which such damages are available without being able to claim the protections of the Excessive Fines Clause. Another business with a net worth of only \$50,000,000

<sup>24</sup> Compare *Dalton v. Meister*, 52 Wis. 2d 173, 188 N.W.2d 494 (1970) (observing that punitive damage awards of 7 1/2%, and 12 1/2% had been considered reasonable and nonexcessive) and *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 136 Cal. Rptr. 132 (1976) (suggesting that a punitive damage award of 33% of a defendant's net worth would be justified if especially egregious conduct were involved.) with *Aldrich v. Thomson McKinnon Securities, Inc.*, 756 F.2d 243 (2d Cir. 1985) (remitting award equal to .9% of defendant's net worth).

would be subject to a punitive award of \$1,000,000 for the same conduct or for much more heinous conduct.

Finally, the use of wealth as a criterion for determining the excessiveness of any particular punitive damage award does not take into account the fact that businesses such as insurance companies engage on a daily basis in thousands of transactions, such as the processing of claims, many of which could theoretically result in the imposition of punitive damages. Thus, placing some arbitrary limit on punitive damages in one case—such as 2% of net worth—would leave a company exposed to having its entire net worth wiped out by fifty successful plaintiffs out of literally thousands of claims processed. Because the financial status and solvency of insurance companies is of such overriding concern to insurance regulators and the public, see *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969), allowing punishment to be imposed on insurance companies in unlimited, unpredictable, and excessive amounts predictably creates serious and unforeseen consequences.<sup>25</sup>

The Court therefore should adopt a test faithful to the historical antecedents of the Excessive Fines Clause—namely, the test enunciated by this Court in *Solem v. Helm*. In *Solem*, the Court looked to three objective factors to determine whether a punishment was constitutionally disproportionate: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." 463 U.S., at 292.

<sup>25</sup> State insurance regulatory schemes are typically comprehensive and include a monetary penalty structure under which state regulators may punish unfair claims practices. See, e.g., *Bettius & Sanderson, P.C. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 839 F.2d 1009, 1017 (4th Cir. 1988) ("Virginia has enacted detailed legislation regulating the activity of insurance companies . . . provid[ing] for punishment and deterrence without authorizing punitive damages against errant insurance companies.").



In a civil context, this test, which could be universally applied without the necessity of drawing constitutional distinctions among types or sizes of businesses, would bring into harmony the States' affirmative regulation of business activity and the uncontrolled regulation of business activity by private plaintiffs seeking punitive damages. For example, in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the appellant insurance company was assessed with a \$3,500,000 punitive damage award, which was over 2,000 times larger than the actual damages suffered by the appellees. Moreover, the punitive damage award was over 1,000 times larger than any of the fines that had been established for the same or similar conduct by the Alabama legislature. Such an award is excessive under either of the first two prongs of the *Solem* test.

**C. "Wealth" Is Analytically Irrelevant to Fulfillment of the Retributive and Deterrent Purposes of Punitive Damage Awards**

A defendant's wealth is an irrelevant indicator of the appropriate fine necessary to carry out the retributive and deterrent purposes of punitive damage awards. Indeed,

[t]he degree of admonition—the amount of the judgment in relation to the [defendant's] means—is not . . . tied to any concept of what is necessary to deter future conduct nor is there even any way to determine that the jury has considered the culpability of the conduct involved in the particular case. Thus the essence of the discretion is unpredictability and uncertainty.

*Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 85 (1971) (Marshall, J., dissenting). Cf. *Fact Concerts, supra*, 453 U.S., at 268-69 ("it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality . . . . the impact on the individual tort-

feasor of this deterrence in the air is at best uncertain."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 283 (1984) (Powell, J., dissenting, joined by Burger, C.J., and Marshall and Blackmun JJ.) (where jury was instructed as to financial worth of the defendant, the jury "impose[d] unfocused penalties solely for the purpose of punishment and some undefined deterrence.").

As discussed in part I above, pp. 15-17, there is current, respected authority supporting the proposition that the introduction of wealth as a factor in assessing the quantum of punishment to be imposed in a case retards, rather than advances, the purposes of such punishments. This is especially true when the defendant is a corporation. See *Br. of Navistar International Transportation Corp.*, as *Amicus Curiae*. Although there may be room for disagreement on that issue, the very fact that it is contested and its resolution involves the decision of complex and interrelated political, social and economic issues disqualifies the use of wealth as a test for excessiveness under the Excessive Fines Clause.

Juries often hear evidence regarding the defendant's wealth prior to determining whether the defendant's conduct was egregious enough to give rise to punitive damages liability, and this naturally "increases the possibility that the jury will ignore the legal rules for establishing liability, and will instead award damages based on 'deep pocket' considerations." Comment, *Pretrial Discovery of Net Worth in Punitive Damages Cases*, 54 S. Cal. L. Rev. 1141 (1981); Sales & Cole, *supra*, at 1148 ("Permitting the fact finder to consider evidence of a wrongdoer's wealth is really nothing more than a camouflaged mechanism designed to encourage large punitive assessments. In essence, it is a procedural device that promotes the redistribution of wealth in society."). To give constitutional imprimatur to an *ad hoc* system of wealth redistribution<sup>26</sup>

<sup>26</sup> Not only is the system *ad hoc*, but it is also regressive. The recipient



by juries that may result in punitive fines bearing little or no relationship to the egregiousness of the defendant's conduct would only serve to exacerbate the harm caused by modern punitive damage regimes that fail to achieve their stated purposes of retribution and deterrence. Furthermore, the failure of a punishment to achieve these objectives itself raises questions under the Eighth Amendment. See *Thompson, supra*, 108 S. Ct., at 2700. See Br. of Metromedia, Inc., as *Amicus Curiae*, at 22 & n.15.

### CONCLUSION

Amici return to where they started. In *Silkwood v. Kerr-McGee Corp.*, *supra*, four members of the Court made a simple point that cuts through the dense cloud of dust kicked up by the proponents of punitive damages whose coffers are threatened by any application of constitutional principles to a punitive damage system that has heretofore operated extra-constitutionally:

By establishing maximum fines, [a legislature] implicitly state[s] its views on the size of monetary penalties it deem[s] sufficient to achieve both punishment and deterrence.

464 U.S., at 283 n.13. The Legislatures of the several States have established statutory fines, either directly or by analogy, for most of the conduct for which punitive damages are presently available. The Court should adopt

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of a large punitive damage award, having already been fully compensated for his or her actual damages, in effect is given a windfall. The company made to pay the award must consider it a cost of doing business which in turn results in higher costs for its services to consumers. Thus, rather than serving to punish the wealthy, the burden of punitive damages often falls hardest on those least able to shoulder it—low- or fixed-income consumers. Cf. *Fact Concerts, supra*, 453 U.S., at 267 ("punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort."); Br. of Navistar International Transportation Corp., as *Amicus Curiae*.

a test of excessiveness under the Eighth Amendment's Excessive Fines Clause that focuses on the relationship between the punitive damage award and the harm done and that utilizes these legislative judgments. Such a test would avoid the pitfalls, uncertainties and inconsistencies that would inevitably flow from the introduction of wealth into this constitutional calculus.

January 19, 1989

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**AMICUS CURIAE**

**BRIEF**

No. 88-556

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., and  
BROWNING-FERRIS INDUSTRIES, INC.,  
*Petitioners*  
v.

KELCO DISPOSAL, INC., and JOSEPH KELLEY,  
*Respondents*

On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

BRIEF FOR  
NAVISTAR INTERNATIONAL  
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AS AMICUS CURIAE SUPPORTING PETITIONERS

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### QUESTION PRESENTED

Whether the award of punitive damages in this case violates the Excessive Fines Clause of the Eighth Amendment, when the only factors justifying the size of the award are the income and net worth of the defendant.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

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No. 88-556

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BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., and  
BROWNING-FERRIS INDUSTRIES, INC.,

*Petitioners*

v.

KELCO DISPOSAL, INC., and JOSEPH KELLEY,  
*Respondents*

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On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

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**BRIEF FOR  
NAVISTAR INTERNATIONAL  
TRANSPORTATION CORP.  
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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**INTEREST OF THE AMICUS CURIAE**

Navistar International Transportation Corp., a wholly owned subsidiary of Navistar International Corporation (formerly International Harvester Co.), is the nation's largest manufacturer of heavy- and medium-duty trucks. Like many manufacturing firms, it is repeatedly confronted with large punitive damages claims.

The approach of the court of appeals in this case, if it were to prevail, would permit an award of punitive damages against a large corporation to be justified solely by reference to the corporation's size. Because Navistar be-

lieves this approach has no foundation in logical or economic analysis, it offers this brief to aid the Court in its deliberations.\*

### STATEMENT

Petitioner Browning-Ferris Industries, Inc. (BFI) operates a nationwide commercial and industrial waste disposal business. Respondents operate a waste disposal business in Burlington, Vermont. From 1981 to 1985, petitioners and respondents competed in the Burlington market. During part of that period, petitioners engaged in a strategy of aggressive price-cutting. In 1985, petitioners left the Burlington market. Pet. App. 2a-3a.

Respondents brought this action in the United States District Court for the District of Vermont, claiming that petitioners violated Section 2 of the Sherman Act, 15 U.S.C. § 2, and tortiously interfered with respondents' contractual relations in violation of Vermont law. Pet. App. 3a. Specifically, respondents alleged that petitioners had engaged in predatory pricing by setting prices at an unjustifiably low level in an effort to drive respondents from the market so that petitioners could monopolize it. *Id.* at 3a, 5a. The jury found petitioners liable on both the state and federal claims at the first phase of a bifurcated trial. *Id.* at 4a.

At the damages phase of the trial, the closing argument of respondents' counsel repeatedly emphasized that the jury should "send a message back to Houston" (Pet. App. 30a), the location of BFI's headquarters.<sup>1</sup> In ad-

\* The parties' letters consenting to the filing of this brief have been lodged with the Clerk.

<sup>1</sup> See, e.g., Pet. App. 30a ("[P]unitive damages . . . are intended to send a message, as the judge will tell you. This will be your opportunity to make a statement for you six people to send a message back to Houston, send a message back to Wall Street."); *id.* at 32a ("This is a company that speaks only one language, and that language is money talks. And in order for you to send them

addressing the question of how much the jury should award in punitive damages, respondents' counsel dwelt exclusively on BFI's gross annual revenue. He argued, for example, that in deciding how to "make an impression" on BFI, the jury should consider that an award of \$13 million in punitive damages against BFI "would be the equivalent of" only a \$200 fine against a person earning \$20,000 per year. Pet. App. 34a-35a.

The district judge charged the jury that "[i]n determining the amount of punitive damages . . . you may take into account the character of the defendants, their financial standing, and the nature of their acts." C.A. App. 1180. The jury then awarded respondents \$51,146.00 in compensatory damages on the Sherman Act claim, an equal amount of compensatory damages on the state tort claim, and \$6,000,000.00 in punitive damages on the state claim. *Id.* at 4a.<sup>2</sup>

The court of appeals affirmed (Pet. App. 1a-14a), rejecting petitioners' argument that the punitive damages award violated the Excessive Fines Clause of the Eighth Amendment (*id.* at 10a-12a). The court of appeals relied exclusively on various measures of BFI's financial status in upholding the \$6 million award. The court stated that "[f]aced with evidence that [petitioners] wilfully and deliberately attempted to drive [respondents] out of the market, the jury imposed punitive damages amounting to less than .5% of BFI's revenues, approximately .6% of its net worth, and less than 5% of its net income, for fiscal year 1986." *Id.* at 11a. The court then noted that other jurisdictions had upheld punitive damages awards that bore a similar relationship to the wealth of the de-

a message . . . it will have to be expressed in that language, in dollars, that's the way the law gives you the authority and the power to do it.").

<sup>2</sup> The district court required respondents to choose between the federal and state remedies. Pet. App. 26a-27a.

fendant (*ibid.*) and asserted that "we do not think the damages here were so disproportionate as to be . . . constitutionally excessive." *Id.* at 12a.

### SUMMARY OF ARGUMENT

A. The court of appeals' approach—which upheld the punitive damages award in this case solely on the basis of petitioners' financial condition—violates the Excessive Fines Clause because it cannot be justified by either deterrent or retributive objectives.

B.1. The objective of a deterrent punishment is to provide enough of a penalty so that the expected costs of wrongful behavior will exceed the expected gains. The relevant factors in this calculus are the potential gain from the wrongful conduct and the likelihood that the wrongdoer will not be held liable. The wealth of the alleged wrongdoer does not enter into the deterrence calculus.

The courts that have permitted juries to consider a defendant's wealth assert that a greater penalty is required to deter a wealthy actor. Their premise appears to be that as a matter of psychology, a wealthy individual will value money less and therefore may be willing to risk a greater punishment. But this psychological proposition, even if correct, does not support the court of appeals' conclusion that a punitive damages award can be justified *solely* by reference to the defendant's financial condition.

In any event, psychological speculations about individuals, however sound, cannot be carried over to corporations. The fact that a corporation is "wealthy"—that is, large—says nothing about the wealth of any individual. A corporation with enormous resources may be owned by millions of individual shareholders, each of whom has modest income and wealth. Moreover, if employees of larger corporations do have a tendency to commit a disproportionately large number of torts—and we know of

no evidence suggesting that they do—then those corporations will be held liable more often, even if juries know nothing of their size. To allow the jury to attach independent significance to the corporation's size is to engage in double counting.

2. Several courts have suggested that when a defendant is a large corporation, a large punitive damages award is needed to attract the attention of (to "send a message to") high-level management. This rationale for considering a defendant's wealth has no validity. Punitive damages should be calculated in a way designed to serve deterrent and retributive purposes. Sometimes an award, so calculated, will be large enough to attract the attention of a firm's senior management.

But if deterrent and retributive interests do not justify an award large enough to attract the attention of senior management, a jury cannot inflate the award just because it desires to "send a message." Such an inflated award would be the product of a jury's bare desire to inflict a penalty, which is the very definition of an irrational and excessive punishment. In addition, allowing the time and attention of a firm's senior management to be controlled by unguided juries in this way imposes costs on society and benefits no one except the recipient of the windfall punitive damages award.

3. The interest in retribution cannot justify the court of appeals' approach. The award in this case falls on petitioners' shareholders, who are not culpable in any sense. And there is certainly no reason for imposing greater liability on shareholders who happen to hold stock in larger corporations.

C. The court of appeals' exclusive focus on petitioners' financial status also imposes serious costs on society. Allowing a jury to consider a corporate defendant's wealth invites prejudice and irrationality, and excessively large damages awards discourage socially beneficial behavior.



## ARGUMENT

### THE USE OF PETITIONERS' FINANCIAL STATUS AS THE SOLE FACTOR DETERMINING THE SIZE OF THE AWARD OF PUNITIVE DAMAGES VIOLATES THE EXCESSIVE FINES CLAUSE

#### A. Introduction

1. This case presents the question whether the Excessive Fines Clause of the Eighth Amendment permits a state to award punitive damages in an amount that is determined solely by the financial status of the defendant. In rejecting petitioners' claim that the award of punitive damages was excessive, the court of appeals relied exclusively on three indicia of BFI's financial status: its revenues, net income, and net worth. The court did not suggest that any other consideration justified the award. Moreover, the jury was instructed to consider BFI's "financial standing," and respondents' counsel relentlessly urged the jury to attach decisive importance to BFI's gross revenues.

Consequently, if the approach of the court of appeals were to prevail, other states would be free to make the financial condition of a defendant the sole determining factor in setting the amount of an award of punitive damages. Indeed, it appears that BFI's financial status is the only consideration that can possibly justify the size of the punitive damages award in this case. The \$6 million award certainly bears no discernible relationship to the compensatory damages, and we know of no basis for concluding that the award can be justified by reference to any other arguably appropriate consideration, such as the criminal penalties for comparable acts or petitioners' expected gain from their actions. In any event, because the court of appeals relied exclusively on BFI's financial condition to uphold the punitive damages award, any suggestion that some other factor might justify the amount of the award is properly raised, if at all, in the lower courts on remand.

2. The court of appeals' decision to uphold the \$6 million award solely on the basis of petitioners' financial condition cannot be justified by reference to any of the objectives of the system of punitive damages. The size of a punitive damages award must be determined by the nature of the wrongful conduct, not solely by the characteristics of the wrongdoer. Neither the deterrent nor the retributive objectives of a system of punitive damages can be promoted by focusing exclusively on a defendant's financial condition and ignoring such factors as the amount that the defendant expected to gain from the allegedly wrongful conduct, the injury inflicted on the plaintiff, and the likelihood that the wrongdoer would go undetected or unpunished.

We do not contend that the financial condition of a defendant can never be considered in determining the size of an award of punitive damages. If an individual is held liable for his or her own wrongful conduct, there is a basis for taking the individual's wealth into account in setting a punitive damages award. See pages 14-15, *infra*. But in this case, the punitive damages award was levied on BFI as a corporation. That means, of course, that the award falls on BFI's shareholders.

The court of appeals' error was twofold: it made the defendant's financial condition the sole relevant factor, and it considered the "wealth" of an artificial legal entity—a corporation—when the punitive damages award falls on shareholders who may not be wealthy at all. As we demonstrate below, a corporation's "wealth"—whether measured by assets, net worth, gross revenues, net income, or some other measure—is simply not related to any deterrent or retributive objective.<sup>3</sup> Some of the na-

<sup>3</sup> Indeed, "wealth" is not a useful term for describing what is measured by a corporation's assets, net worth, or gross or net income. A corporation is a network of contractual agreements among individuals. The amount of assets subject to those agree-

tion's largest firms are owned to a large extent by shareholders of ordinary income and wealth (or trustees, such as pension funds, who hold shares on behalf of such people); those people will have no connection, beyond the passive ownership of stock, to any torts committed by corporate employees. By contrast, there are closely-held corporations with revenues and assets a fraction of BFI's that are owned and controlled by a few extremely wealthy individuals. For courts and juries to use the "wealth" of the corporate defendant as a factor in determining the size of punitive damages—much less for them to use "wealth" as the sole factor, as they did in this case—is, as we demonstrate below, simply irrational.

This erroneous view of the significance of the financial status of corporate defendants is increasingly prevalent. In recent years there has been a sharp increase in large punitive damages awards against corporations. See, e.g., M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* (Rand Institute for Civil Justice Study) 14-16, 49-55 (1987); Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 (1982). The lower courts appear to be increasingly of the view that so long as the damages award is only a few percent of a corporate defendant's "wealth," somehow measured, the award is per se not excessive. See, e.g., *Hatrock v. Edward D. Jones & Co.*, 750 F.2d 767, 773 (9th Cir. 1984); *Robinson v. Winn-Dixie Stores, Inc.*, 447 So.2d 1003, 1005 (Fla. Dist. Ct. App. 1984); *Roy Export Co. v. Columbia Broadcasting System, Inc.*, 672 F.2d 1095, 1107 (2d Cir.), cert. denied, 459 U.S. 826 (1982); *Neal v. Farmers Insurance Exchange*, 582 P.2d 980, 991 (Cal. 1978); *Southern Pacific Transportation Co. v. Lueck*, 535 P. 2d 599, 602 (Ariz. 1975).

ments may be said to reflect the size of the corporation. But a network of contractual relations cannot meaningfully be described as "wealthy."

We submit that the Excessive Fines Clause precludes such use of the financial status of the defendant as a factor in determining the amount of a punitive damages award. The Excessive Fines Clause prohibits a state from imposing punitive damages in amounts that exceed those reasonably calculated to achieve the objectives of a system of punishment. Under this standard, the use of BFI's financial status as a substantial factor in setting the size of the punitive damages award cannot be justified.

**B. The Use Of Petitioners' Financial Status To Determine The Size Of The Punitive Damages Award Does Not Serve Any Deterrent Or Retributive Purpose**

Although the Court has not construed the Excessive Fines Clause of the Eighth Amendment, it has interpreted the parallel prohibition against "[e]xcessive" bail. The Court has ruled that "bail set at a figure higher than an amount reasonably calculated to fulfill th[e] purpose[s]" that the government has advanced for imposing bail "is 'excessive' under the Eighth Amendment." *Stack v. Boyle*, 342 U.S. 1, 5 (1951). As the Court recently explained: "[T]o determine whether the government's response is excessive, we must compare that response against the interest the government seeks to protect by means of that response. . . . [B]ail must be set by a court at a sum designed to ensure that goal, and no more." *United States v. Salerno*, 107 S.Ct. 2095, 2105 (1987).

Thus, whatever its precise contours, the Excessive Fines Clause must, at a minimum, preclude fines in amounts that exceed what is "reasonably calculated to fulfill" legitimate punitive purposes. The words of the Clause itself make this clear: a fine that exceeds what is reasonably calculated to promote the objectives of a system of punishment is by definition excessive.

Punitive damages are universally understood to serve two objectives: "to punish reprehensible conduct and to deter its future occurrence." *Electrical Workers v.*



*Foust*, 442 U.S. 42, 48 (1979), quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); see also *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981), citing *Restatement (Second) of Torts* § 908 (1979). It is a mistake of economic logic to suppose that taking into account the net worth or revenues of a defendant like BFI serves deterrent purposes. While the punitive or retributive objective of punitive damages cannot be analyzed as rigorously as deterrence, it is clear that this objective, too, is not rationally served by taking a corporation's financial status into account.

**1. *Petitioners' financial status is not rationally related to any deterrent purpose.***

a. The objective of a deterrent punishment is to ensure that a potential wrongdoer has an incentive not to violate the law. To accomplish this, the punishment must be calibrated so that a person considering whether to act unlawfully will find that the expected losses from punishment will outweigh the expected gains from the wrongful act. If, for example, wrongdoers were certain to be detected and held liable, a punishment would be an effective deterrent so long as it was slightly greater than the gain from acting unlawfully.

Ordinarily, of course, there is no certainty that a wrongdoer will be detected and held to account. In order to compensate for the possibility that the wrongdoer will escape punishment, the penalty, when inflicted, must be significantly greater than the gain that the wrongdoer expects. Suppose, for example, that a person would gain a \$100 benefit from a wrongful act.<sup>4</sup> Suppose further, however, that there is only a 25% chance that a person who commits this wrongful act will be detected and held

<sup>4</sup> Of course, often the benefits from wrongful acts will be psychic gratifications that cannot be readily reduced to dollar amounts; but for the sake of simplicity we assume that the total benefits to the wrongdoer, monetary and otherwise, are worth \$100.

to account. The punishment then must be greater than \$400 in order to deter the wrongful act. A punishment of less than \$400 would make the wrongful act worth the gamble.<sup>5</sup>

This simple model suggests a possible rational basis for punitive damages in some cases. A deterrent purpose might be served by punitive damages equal to some multiple of the defendant's expected gains from the wrongful conduct—a multiple designed to take into account the possibility that the wrongful conduct will go undetected or unpunished. Punitive damages are not always justifiable on this ground, and this measure is not always appropriate; other factors, several of which may entirely negate the rationality of punitive damages, must also be considered.<sup>6</sup> But under this straightforward model of deterrence, an award of punitive damages larger than that dictated by these two factors—the defendant's expected gains and the likelihood of escaping punishment—is “higher than [the] amount reasonably calculated to fulfill [the deterrent] purpose” and is therefore “‘excessive’ under the Eighth Amendment.” *Stack v. Boyle*, 324 U.S. at 5.

<sup>5</sup> See generally S. Shavell, *Economic Analysis of Accident Law* 148 (1987); Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968). The example assumes that the actor is risk neutral.

<sup>6</sup> In particular, a firm that is held liable suffers other losses besides damages—notably the harm to its reputation. In many cases, the sum of compensatory damages, reputational losses, and the costs of litigation, even when discounted by the probability of escaping liability, will be large enough to deter an actor. An award of punitive damages would then be unnecessary.

We note that the probability that a firm engaging in predatory pricing will be detected is quite high. See R. Posner, *Antitrust Law: An Economic Perspective* 226-27 (1976). A firm that is driven from a market by predatory pricing is almost certain to know which competitor was responsible and to have strong incentives to sue.



b. Under this common sense model of deterrence, the financial condition of the defendant plays no role whatever in determining the size of an award of punitive damages. A potential wrongdoer, whatever his or her wealth, will be deterred so long as the expected gains from the wrongful act are less than the expected punishment. That is because the premise of the theory of deterrence is that a person will not act irrationally by doing something that is calculated to lose more than it gains. Undoubtedly people sometimes act irrationally, and in such cases the theory of deterrence does not hold. But there is no basis for concluding that people with more money are more likely to be irrational than people with less money. The wealth of the potential wrongdoer is simply irrelevant.

Moreover, whatever the precise status of wealth as a factor in a deterrent calculus, there can be no justification for ignoring all the other considerations that any deterrent justification would have to consider. That is what the court of appeals did in this case. The court not only upheld the use of the defendants' financial condition as a relevant factor; it permitted the trial court and jury to rely on petitioners' "wealth" as the *sole* factor determining the size of punitive damages awards. The court upheld the \$6 million award against petitioner exclusively on the ground that the award was ".5% of BFI's revenues, approximately .6% of its net worth, and less than 5% of its net income, for fiscal year 1986." Pet. App. 11a. The court did not suggest that the award bore any relationship to petitioners' expected gains, their chances of escaping detection, or any other factor that can be derived from the theory of deterrence. This approach manifestly cannot be justified as "reasonably calculated to fulfill" the interest in deterrence.

c. The court of appeals' apparent belief that punishment should be a percentage of the wrongdoer's assets or income not only is unfounded in a rational theory of

deterrence; it leads to indefensibly anomalous results. Other things equal, larger firms, because of the wider scope of their operations, will tend to commit a proportionately larger number of wrongful acts, including wrongful acts of a kind that give rise to punitive damages. Larger firms will, therefore, suffer a proportionately larger number of punitive damages awards. This is in keeping with the way a rational system of punitive damages should work.

But under the court of appeals' approach, each award would then be *further* enhanced because the firm is large. This double counting bears no rational relationship to any deterrent objective; it amounts to a punishment for being large.<sup>7</sup>

Suppose, for example, that two insurance companies—one ten times the size of the other—issue identical directives to their employees designed to reduce the number of claims that are paid. In response to these directives, examiners wrongfully deny claims. Because of the greater volume of its business, wrongful denials (which, in some jurisdictions, give rise to punitive damages)<sup>8</sup> will of

<sup>7</sup> The draft sentencing guidelines of the United States Sentencing Commission specifically "reject the use of an organization's size or financial performance as a principal measure of penalties." United States Sentencing Commission, *Discussion Materials on Organizational Sanctions* 8.2 (July 1988). The Commission's discussion materials explain (*id.* at 8.2):

The size of an organization may affect the scope of criminal activity and thereby the amount of offense loss, and size or financial resources may affect an organization's ability to pay a loss-based penalty. However, large organizational size alone does not necessarily render an offense more harmful in terms of loss or detectability, and is neither prohibited nor disfavored by the law in general. . . . [P]enalties based primarily on size would distort the central focus of the criminal law on harmful effects.

<sup>8</sup> See, e.g., *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988); *Aetna Life Insurance Co. v. Lavoie*, 106 S. Ct. 1580 (1986).

course occur ten times more often in the larger company. Thus in a given period, there might be fifty punitive damages awards against the large company and five against the smaller company.

If each punitive damages assessment is 1% of the defendant's assets, the large company, after this period, will have lost half its assets. The smaller company, which behaved in exactly the same way, will still have 95% of its assets. It is impossible to identify any deterrent rationale for a system that produces these results. Yet this is the system that the court of appeals endorsed.

d. The most common rationale for considering the wealth of the defendant in assessing punitive damages is the intuition that a dollar is worth less to a wealthy person than to a poor person.<sup>9</sup> This is a psychological premise about how the attitude of people toward money changes as they become wealthier. If this premise is correct, it would require a refinement of the model of deterrence we described above—but only in cases in which an individual defendant is held liable for his or her own conduct. Specifically, if this premise is correct, it suggests that where the defendant is an individual held liable for his own conduct, the defendant's wealth may have a limited role to play in accomplishing deterrence. There remains no justification for making it the sole factor, as the court of appeals did here.

<sup>9</sup> See, e.g., Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 61 (1982); see generally J. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* § 5.36 (1981) (citing cases); K. Arrow, *The Theory of Risk Aversion*, in *Essays in the Theory of Risk Bearing* 90, 96 (1974). The economic term for this notion is that money has a declining marginal utility. Each marginal—i.e. additional—dollar a person gains is worth less to him or her than the previous dollar. It is unclear to what extent this intuition is accurate, or how it might be tested empirically.

More important, however, even if this rationale is accepted, there is no basis whatever for using the "wealth" of the defendant as a factor when, as here, the defendant is not an individual but a corporation that is being held vicariously liable for the acts of employees.

i. If it is true that a dollar is worth less to a wealthier individual, then a larger punitive damages award will sometimes be needed to deter a wealthy individual from acting unlawfully. This will be true only when the state attempts to use punitive damages to deter what might be called a non-economic tort—a tort such as assault or defamation in which the wrongdoer stands to gain non-monetary benefits. If money is worth less to a wealthy person, such a person may be willing to pay more for the spiteful satisfaction of assaulting or defaming an enemy. Consequently, a punitive damages award sufficient to deter a less wealthy individual from committing these torts might be insufficient to deter a wealthy person. In these circumstances there is, therefore, some basis for permitting the jury to consider the defendant's wealth.

ii. But these arguments for considering the defendant's wealth fail completely when the defendant is not an individual but a corporation being held vicariously liable for the acts of its employees. The argument for taking wealth into account rests on a supposition about individual psychology—that money is worth less to a wealthy person. This supposed fact of individual psychology simply cannot be carried over and applied to corporations.

A corporation is an artificial legal entity. It does not have psychological characteristics. Unlike an individual, a corporation does not have an attitude toward money. Courts that have allowed the wealth of a corporate defendant to affect the size of punitive damages awards have gone astray precisely because they unthinkingly car-



ried over to corporations a rationale that is plausible only in the case of individuals.<sup>10</sup>

To be sure, the owners and employees of a corporation will have various attitudes toward money; it is possible that the wealthier they are, the less they will value money. But there is no systematic or necessary relation between the wealth of a firm and the wealth of these individuals. Consequently, the fact that a corporation is "wealthy"—that is, that it has substantial assets, revenues, net worth, or income—says nothing about the psychological propensities of the individuals who make decisions on behalf of the corporation.

But even if there were some correlation between a corporation's size and its employees' propensities to commit torts—and we know of no evidence that such a correlation exists—it would again be double counting to allow the corporation's size to play a role in justifying an award of punitive damages. If *any* corporation's employees, for whatever reason, have a propensity to commit an unusually large number of torts, the corporation will be subjected to an unusually large number of damages awards—both compensatory and, if applicable, punitive

<sup>10</sup> For example, in *Hall v. Montgomery Ward & Co.*, 252 N.W.2d 421 (1977), the Supreme Court of Iowa, in holding that the wealth of a corporate defendant could be considered in assessing punitive damages, uncritically relied on the rationale supplied by courts that had applied this rule to individual defendants. See *id.* at 424 ("The rationale employed in [other courts'] decisions is that the jury needs to know the extent of the defendant's holdings in order to know how large an award of damages is necessary to make him smart. *E.g.* *Suzore v. Rutherford*, 35 Tenn. App. 678, 684, 251 S.W.2d 129, 131 (1952) ('what would be "smart money" to a poor man would not be, and would not serve as a deterrent, to a rich man')."). The defendant in *Suzore*, however, was an individual. See also *Neal v. Farmers Insurance Exchange*, 582 P.2d 980, 990 (Cal. 1978) ("[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.").

damages. It does not matter whether the propensity to commit torts arises from poor hiring practices, from the internal culture of the firm, from the nature of the business, from the fact that the employees have large corporate resources at their disposal, or from some other factor: if the employees commit a disproportionate number of torts, the corporation will suffer a disproportionate number of damages awards. If the employees of large corporations systematically commit more than their share of outrageous torts, large corporations will, quite properly, suffer more than their share of punitive damages awards—even if the jury knows nothing about the corporation's size.

Thus, if the employees of large corporations have an unusual propensity to commit torts that give rise to punitive damages—and we repeat that we know of no evidence that they do—to allow the corporation's size to play an independent role in calculating punitive damages is to engage in double counting: the corporation suffers because it has employees who expose it to disproportionately high punitive damages liability, and then suffers again because it is large. To impose an additional penalty on a firm just because it is large—in addition to the punishment that is assessed for the specific torts committed by its employees—manifestly exceeds the "amount reasonably calculated to fulfill" deterrent purposes and is therefore "excessive" under the Eighth Amendment." *Stack v. Boyle*, 342 U.S. at 5.

Finally, there is no relationship between the net worth, income, or revenues of a firm and the wealth of the firm's owners, who have the power to supervise the firm's employees. As we have noted, the shareholders of the nation's largest corporations are often persons of average income and wealth. A partnership with large assets, revenues, or profits may be composed of many persons of moderate means; a closely-held corporation with relatively small assets and income may be owned by a few



wealthy individuals.<sup>11</sup> The financial status of the corporate defendant is simply irrelevant to deterrence.

iii. This argument is even stronger in the case of what might be called economic torts, in which the defendant's only prospective gain from the tort is monetary. Predatory pricing—the tortious conduct in this case—is an economic tort, since it is engaged in for the purpose of monopolizing a market and thereby increasing the firm's profitability.<sup>12</sup>

<sup>11</sup> If it is true that a dollar is worth less to a wealthy person, then the individual wealth of a firm's owners may affect the way in which they supervise their employees. But this is a function of the wealth of the owner. It has nothing to do with the "wealth" of the corporation.

Moreover, although the issue is not presented in this case, there would be no basis for any suggestion that shareholders' personal wealth, somehow calculated, should affect the size of an award of punitive damages. (In any event, in a case involving a large publicly-held corporation, presenting adequate evidence at trial of the shareholders' personal wealth would surely be impossible.) A shareholder's personal wealth arguably affects his or her interest in monitoring the behavior of corporate employees. But if, because of less intense monitoring, those employees commit torts that subject the firm to punitive damages liability, the shareholder will suffer because the firm will become less profitable. This will happen so long as the amount of punitive damages is calculated so as to make it unprofitable to engage in tortious conduct—the model we outlined at pages 10-11 *supra*.

It is possible that wealthier shareholders are less concerned with profit; they may be inclined to pay less attention to their investments because they value leisure, convenience, or the opportunity to spend their time in other productive ways. As an empirical matter, this is hardly an obvious proposition; the opposite seems at least as plausible. But if wealthier shareholders do pay less attention to their investments, their investments will simply be less profitable. Again, to allow a jury to impose an additional penalty because they are wealthy would be double counting.

<sup>12</sup> Pricing designed to drive a competitor out of business is unlawful only if it results in monopoly or constitutes an attempt to monopolize. See, e.g., *Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 S. Ct. 484, 493 (1986).

In the case of an economic tort, by hypothesis, a potential wrongdoer is seeking money, not a form of psychic satisfaction. In this situation, the supposition that a dollar is worth less to a wealthy person does not justify inflicting greater punishment on a wealthy person. That is because the person deciding whether to commit the wrongful act is balancing a potential gain of money against a potential loss of money. If the expected loss is greater than the expected gain, the potential wrongdoer will be deterred, whatever his or her (or its) wealth. If, in our earlier example, a wrongful action will gain \$100 and has a 25% chance of being detected, the only question is whether the penalty exceeds \$400. The calculus is precisely the same, whatever the wealth of the actor.<sup>13</sup>

<sup>13</sup> The economic literature does suggest one reason for taking the defendant's wealth into account even in cases involving economic torts, although again this reason does not apply when the defendant is a corporation. The reason again rests on a supposition about individuals' psychological propensities. It is sometimes suggested that wealthier individuals are less risk averse. See, e.g., K. Arrow, *supra* note 9, at 96; *Symposium Discussion*, 56 S. Cal. L. Rev. 155, 187 (1982) (remarks of A. Mitchell Polinsky). A risk averse person, when faced with a choice between a sure gain of \$100 and a 25% chance of gaining \$400, will prefer the former.

The supposition is that wealthy individuals display this propensity to a lesser degree. If this is true, it is an argument for taking wealth into account, in the case of individual defendants, in determining the proper measure of a deterrent sanction even for an economic tort. Again, however, suppositions about individual psychology, however valid, cannot be carried over to corporate behavior. The risk aversion displayed by corporate employees will depend on their personal characteristics; there is no reason to believe that it will be related to the corporation's wealth. And even if the employees' risk aversion is somehow related to the corporation's wealth, that does not justify imposing additional punitive damages on the corporation. See pages 16-17 *supra*.

2. *The desire to draw a matter to the attention of a defendant's senior management is not rationally related to any legitimate purpose of a system of punishment.*

a. The use of a large corporate defendant's "wealth" as a justification for a massive award of punitive damages is sometimes explained as a way of ensuring that senior management will devote its attention to the matter. This is evidently what respondents' counsel meant when he implored the jury to "send a message to Houston."<sup>14</sup> Unlike the notion that money is worth less to a wealthy individual, which might sometimes (in the case of an individual defendant) play a legitimate role in determining the appropriate level of punitive damages, this purported rationale has no independent validity.

There is little doubt that, other things equal, a larger damages award is more likely to get the attention of a corporation's top management than a small award. And ordinarily, the larger the corporation, the larger the award will have to be before it will come to the attention of senior corporate managers. But as we explain below, the jury's desire to draw senior management's at-

<sup>14</sup> Pet. App. 30a. See, e.g., *Marey v. Freightliner Corp.*, 450 F. Supp. 955, 964 (N.D. Tex. 1978) ("The larger the company, the larger the award of punitive damages must be in order to bring this message home"), aff'd in part, vacated and remanded in part, 665 F.2d 1367 (5th Cir. 1982). (The court of appeals disapproved the punitive damages award in this case for other reasons. See 665 F.2d at 1377-79.) One common explanation of the reason for taking a corporate defendant's wealth into account is that a larger award is needed to make a large corporation "smart" (e.g., *Hall v. Montgomery Ward & Co.*, 252 N.W.2d 421, 424 (Iowa 1977)) or feel "discomfort" (*Neal v. Farmers Insurance Exchange*, 582 P.2d 980, 990 (Cal. 1978)). This may be a way of expressing the perceived need to "send a message" to the senior management; or it may be a rough way of expressing the notion that money is worth less to wealthy persons. As we have explained, the latter notion, while arguably valid in the case of individuals, has no applicability to corporations.

tention to a matter does not justify increasing the size of the award. Unless some other interest, such as deterrence, warrants having the matter drawn to senior management's attention, such a desire on the part of the jury is just that—a bare desire unconnected with any legitimate punitive purpose.

If the Eighth Amendment prohibition against excessive fines is to have any effect, it must mean that a jury's bare desire to punish a defendant is not sufficient to justify the amount of a fine. Otherwise, no level of punishment would be excessive. The amount of a punitive exaction must be reasonably calculated to promote the purposes of a system of punishment, such as deterrence and retribution.

Sometimes the deterrence calculus we described above will justify a large award of punitive damages—possibly an award large enough to attract the attention of senior management. But often neither the interest in deterrence nor any other legitimate state interest will justify an award in an amount sufficient to attract the attention of a firm's senior management. In such cases, the jury cannot simply inflate the award to such an amount. The fact that the jury desires to attract senior management's attention does not justify such an inflation, unless the desire reflects a legitimate deterrent or other purpose.

The court below allowed the jury to make an award large enough to "send a message to Houston" even though the court articulated neither a deterrent justification nor any other justification for sending such a message. This is the very definition of an irrational, and therefore excessive, punitive damages award.

b. The notion that there is a need to bring a matter to senior management's attention may result from the sense that only senior management "cares" about a firm's profitability. It is true that senior management's com-



pensation is often directly linked to a firm's profitability (through the use of stock options as compensation, for example). But it does not follow that a punitive damages award can be an effective deterrent only if it attracts the attention of senior management. Indeed, the opposite conclusion follows: assuming senior management is concerned with profitability, an award in the size dictated by the deterrence calculus will have the desired deterrent effect.

Senior managers concerned with profitability will institute throughout the firm policies and procedures designed to make the firm profitable. See generally Mirrlees, *The Optimal Structure of Incentives and Authority Within An Organization*, 7 Bell J. Econ. 105, 128-30 (1976); see also Ellis, 56 S. Cal. L. Rev. at 67-71. Even the relatively trivial actions of lower-level employees can, of course, impair a firm's profitability. Thus, if senior managers are concerned about profitability, they will take steps to ensure that such employees act correctly. They will, for example, institute procedures designed to lead to the discharge of any employee who repeatedly causes the firm to incur even small punitive damages awards. Therefore, even on the assumption that only senior managers are directly concerned to increase profits, it is fallacious to believe that a punishment must come to their attention in order to accomplish its deterrent purposes.

The notion that punitive damages awards should be calculated to attract the attention of senior management reveals a deep inconsistency in the position of respondents and others who advance that notion. Respondents portray large corporations as relentless seekers after profit. See Pet. App. 32a (closing argument of respondents' counsel) ("This is a company that speaks only one language, and that language is money talks."). But a profit-seeker will act the same way no matter how wealthy it is: it will not take an action when the ex-

pected losses, including punishment, exceed the expected gains. Its own wealth will not enter into its calculations. Punitive damages governed by such factors as the expected gain and the probability that the actor will escape punishment are sufficient to deter a profit-seeking firm—whatever the firm's "wealth."

We do not suggest that all firms are profit-maximizers. Some may act irrationally for various reasons. But we know of no reason to believe that "wealthier" firms are more prone to act irrationally. If anything, their accumulation of resources suggests that they are run more efficiently. And in any event, to the extent firms act irrationally, it is unclear how any punitive measure can deter them.

c. The view that a punitive damages award can be justified as a means of "sending a message" to senior management not only lacks any rational connection to the legitimate purposes of a system of punishment; it is potentially highly wasteful and even harmful to society. The time and attention of senior management are scarce resources, and managers are obligated to devote them to making the firm more productive and efficient. If a firm is incurring damages liability, compensatory or punitive, in amounts large enough to attract the attention of senior management, then that problem is a proper, indeed imperative, object of their concern.

But there is no reason to require a firm's management to devote its attention to a problem simply because a jury unguided by any rational-deterrent or punitive purpose—often a jury in another state where few citizens have a stake in the efficient management of the firm—decides to "send a message." Resources should be spent on the most important issues of productivity and efficiency confronting the corporation (including, if they exist, any major problems of corporate liability). But if "sending a message" is accepted as a justification for the



measure of punitive damages, firms will first have to try to anticipate when a jury is likely to decide to award an inflated amount of punitive damages, then allocate resources in the ways that have been arbitrarily selected by juries. Not only is this a needlessly wasteful burden to impose on a firm; it is counterproductive from society's point of view. Senior managers' attention will be diverted from those activities of the firm that have the greatest impact on society. They will instead be preoccupied with the vagaries of potential litigation.

**3. No legitimate retributive purpose is promoted by using the defendant's financial status to determine the size of an award of punitive damages.**

It is readily apparent that a corporate defendant's financial status is unrelated to any retributive objective of punitive damages. To begin with, corporate liability is always vicarious, and retribution cannot justify vicarious liability for punitive damages. The theory of retribution is that a wrongdoer should receive his or her "just deserts"—a punishment proportional to the individual's culpability. "Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his wrongful conduct." *City of Newport*, 453 U.S. at 267.

In cases of corporate liability, the shareholders bear the damages award even if they did everything they could to avoid wrongdoing. In this case, for example, there is no sense in which BFI's shareholders can be said to be morally culpable. Since punitive damages liability can be imposed on shareholders even when they are unquestionably completely innocent, retribution cannot justify such awards.

There is some question whether vicarious liability for punitive damages is ever appropriate. See, e.g., *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101 (1893); J. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* 140-43 (1981). But whatever the status of a

deterrent justification for holding a corporation vicariously liable for punitive damages, retribution cannot justify such liability. Thus in *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982), the Court interpreted the Sherman Act to permit vicarious liability for treble damages only after it had satisfied itself that treble damages served a deterrent, not a retributive, purpose. See *id.* at 575; see also *id.* at 583 (Powell, J., dissenting) (opposing imposition of treble damages liability on the ground that it is "punitive").

In any event, even if one could somehow contrive a retributive justification for imposing vicarious liability on shareholders, there would be no justification for taking the corporation's "wealth" into account in setting the size of the award. A retributive award might be measured by the culpability of the wrongdoer or by the harm done. See, e.g., H. Packer, *The Limits of the Criminal Sanction* 9-11, 37-38 (1968). Once an award is determined in accordance with such factors, there is no justification for enhancing it because the wrongdoer has substantial assets or income. And even if somehow there were such a reason, there would certainly be no basis for visiting enhanced retribution on shareholders because they happened to hold stock in a large corporation.

**C. The Use Of Petitioners' Financial Status To Determine The Size Of A Punitive Damages Award Invites Verdicts Based On Prejudice And Inflicts Harmful Consequences On Society**

The Excessive Fines Clause requires that a fine be reasonably calculated to promote a legitimate punitive purpose. As we have explained, permitting a corporate defendant's financial status to play a substantial role in determining the size of an award of punitive damages is not rationally related to any such purpose.

In addition, allowing a jury to consider the assets, net worth, or revenues of a corporate defendant has highly damaging consequences. Allowing a jury to consider a

defendant's wealth is likely to prejudice the jury and cause it to inflate the award. In addition, inflated punitive damages awards can have deleterious effects on the functioning of firms in the economy.

a. The Court has recognized the danger that when a jury believes a damages award will be paid out of large financial resources, it will inflate the award and lose sight of the legitimate rationales for damages. See *City of Newport*, 453 U.S. at 270-71; *Washington Gas Light Co. v. Lansden*, 172 U.S. 534, 550-56 (1890). In most jurisdictions, evidence that a defendant has liability insurance is inadmissible for precisely this reason. See *W. Keeton et al., Prosser and Keeton on The Law of Torts* 590 (5th ed. 1984). But under the court of appeals' approach, a defendant's "wealth" is treated not as a dangerously prejudicial consideration but as the only factor the jury need take into account.

In the case of a corporate defendant held vicariously liable for the actions of its employees, the danger of such prejudice is even greater. Corporate assets and revenues can be so large that it appears that no one will "really" suffer even from a very large damages award. Indeed, respondents' counsel made that argument explicitly in this case. His summation ignored any rational deterrent argument for punitive damages and instead focused exclusively on the ratio between BFI's gross revenues and the award of punitive damages he was seeking. Respondents' counsel urged, for example, that only a very large award would "mean" as much to petitioners as even a modest sum would mean to an individual of moderate income.

This argument reflects the fallacy that underlies the view that a corporation's "wealth" should determine the size of a punitive damages award—the fallacy of equating the corporation to an individual with similar assets or revenues. If a corporate defendant's financial status can be presented to a jury as a basis for awarding puni-

tive damages, plaintiffs' attorneys will be free to personify the corporation and to create the image of an unimaginably wealthy individual who has done wrong with an evil mind—a very powerful image to place before a jury when it is assessing punishment. But corporations are not individuals, and their assets or revenues reflect not the wealth of any individual but the scope of the operations that a group of individuals—often a large group of individuals of average wealth—has chosen to engage in. To allow a jury to focus on the "wealth" of a corporate defendant is to ignore those basic economic facts, and to invite irrational judgments based on prejudice.

b. To establish that a punitive damages award is excessive within the meaning of the Eighth Amendment, we need only show that it is not reasonably calculated to promote any legitimate objective of a system of punishment. We need not show that it is also affirmatively harmful. In fact, however, irrationally large punitive damages awards can be expected to have decidedly harmful effects on the economy.

These effects arise because of overdeterrence. See, e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422, 441-42 (1978). The object of a rational system of punitive damages is to deter wrongful behavior. A properly calibrated punitive damages award will have the effect of deterring just that behavior and no socially beneficial behavior. A system in which grossly excessive awards are allowed, however, will cause a potential defendant not just to refrain from acting improperly, but to refrain from many forms of socially beneficial behavior, out of fear that a jury might mistake such behavior for wrongful conduct.

This case is a dramatic illustration. As the Court has recognized, predatory pricing is difficult to distinguish from the very activity in which firms are supposed to engage—vigorous, legitimate price competition. See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 S. Ct. 484,

495 n.17 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1360 (1986). A large corporation may be, at any time, competing in dozens of markets against hundreds of competitors. If the court of appeals' approach in this case were to prevail, such a firm would understand that whenever any one of these competitors convinced a jury that the firm had stepped over line into predatory pricing—an exceptionally difficult line to draw—the firm could be held liable for an amount of punitive damages at least as high as “.5% of [its] revenues, approximately .6% of its net worth, [or] . . . 5% of its net income” (Pet. App. 11a).

One such successful suit would be certain to precipitate others, and a large firm with hundreds of competitors could, unless it changed its practices, find itself in financial difficulty. In these circumstances, it would hardly be surprising if the firm simply decided to compete less vigorously. In this way, an irrationally large punishment, such as the award in this case, can have substantial and unwarranted adverse affects not only on the defendant but on society as a whole.

### CONCLUSION

The judgment of the court of appeals should be reversed.  
Respectfully submitted.

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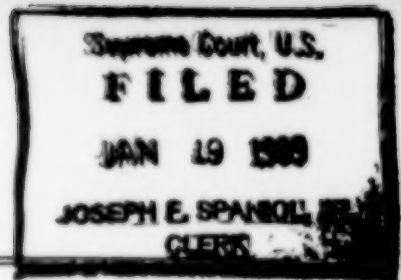
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**AMICUS CURIAE**

**BRIEF**

10  
No. 88-556



In The  
**Supreme Court of the United States**  
October Term, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC.  
- AND BROWNING-FERRIS INDUSTRIES, INC.,

*Petitioners,*

v.

KELCO DISPOSAL, INC., AND JOSEPH KELLEY,

*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit

BRIEF OF AMICUS CURIAE  
NATIONAL ASSOCIATION OF  
MUTUAL INSURANCE COMPANIES  
IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE  
NATIONAL ASSOCIATION OF  
MUTUAL INSURANCE COMPANIES  
IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE<sup>1</sup>

The National Association of Mutual Insurance Companies ("NAMIC") is an insurance company trade association comprised of more than 1200 companies

<sup>1</sup> Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

throughout the United States who underwrite insurance of all types. Founded in 1895, NAMIC exists to provide services that will assist in the effective utilization of insurance resources and promote a financially stable, competitive private insurance industry for the consuming public.

NAMIC member companies offer every type of insurance, including life, health, property, liability, multiple lines, commercial, allied lines and reinsurance. Its members range in size from the very largest property and casualty insurer to the very smallest.<sup>2</sup> In 1985, NAMIC members were responsible for over \$30 billion in net written premiums for property and casualty insurance alone, representing more than 21 percent of that business nationwide. That figure has since grown to well over \$42 billion for 1987, representing premiums on hundreds of thousands of property and casualty insurance policies.

As recent cases demonstrate, each policy risk underwritten by a NAMIC member represents an event that could potentially result in substantial punitive damages exposure against the company directly,<sup>3</sup> as well as against its insured. Indeed, insurers often are misperceived as providing social insurance, with unlimited public

<sup>2</sup> NAMIC's membership in 1987 included 32 companies whose property and casualty business exceeded \$100 million annually in net written premiums, as well as 112 companies who wrote less than \$50,000.

<sup>3</sup> See, e.g., *Nationwide Mutual Ins. Co. v. Clay*, No. 88-157, cert. pending; *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. \_\_\_\_ (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

resources to be allocated as a jury may dictate. As one commentator has observed, "[i]t is a good guess that rich men do not fare well before juries."<sup>4</sup>

Mutual companies, moreover, are owned by their policyholders,<sup>5</sup> who are adversely affected by disproportionately large punitive damages awards. Arbitrary and unpredictable punitive awards, as in this case, are incapable of actuarial management and hence pose serious, if not potentially catastrophic, consequences for insurance companies (especially the smaller companies) desiring to promote a stable, competitive insurance market. There consequently is a strong public interest, which *amicus* advances in this brief, in declaring that arbitrary and disproportionately large punitive awards are inconsistent with due process and the prohibition of excessive punishments.

---

## SUMMARY OF THE ARGUMENT

NAMIC adopts petitioner's argument that the \$6 million punitive award in this case violates the Excessive Fines Clause of the Eighth Amendment. Furthermore, due process requires that actual and punitive damages bear a reasonable relationship to each other. Where a punitive award is arbitrary and oppressive, the rule of law requires that it be set aside as excessive. The Court

<sup>4</sup> Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173, 1191 (1931).

<sup>5</sup> See *Union Ins. Co. v. Hoge*, 62 U.S. 35, 64-65 (1859). See also, Couch on Insurance 2d (Rev ed) § 19:14 (1984).

has taken such action in the past, and it should do so here.

---

### ARGUMENT

#### 1. *The Eighth Amendment Prohibits Excessive Punishments.*

NAMIC adopts petitioner's argument that the \$6 million punitive award in this case violates the Excessive Fines Clause of the Eighth Amendment.

#### 2. *Due Process Governs Civil Punishments.*

Independent of the excessive fines prohibition, the Due Process Clause of the Fourteenth Amendment forbids civil punishments that are arbitrary and grossly disproportionate. Punitive damages liability, being a deprivation of property, must comport with due process. As this Court has recognized, due process extends to "defendants hoping to protect their property." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). See also, *Barbier v. Connolly*, 113 U.S. 27 (1885). The notion of fair punishment suggests a sum adequate to punish the harmful conduct and no more. Punitive awards that are grossly disproportionate to the actual harm, as measured by compensatory damages, exceed the limits of reasonableness. Hence, they are fundamentally unfair.

#### 3. *Due Process Prohibits Disproportionate Punishments.*

Due process requires that actual and punitive damages bear a reasonable relationship to each other. See generally, *Wheeler, The Constitutional Case for Reforming*

*Punitive Damages Procedures*, 69 Va. L. Rev. 269, 272-78 (1983). This principle is accepted in criminal law, where punishment must reasonably match the offense. It likewise applies to civil punishments.

More than a century of precedent exists for permitting juries to impose civil punishments in addition to compensatory damages. See, e.g., *Day v. Woodworth*, 181 U.S. 363, 371 (1851) (action for civil trespass). Due process, however, forbids punitive awards that are arbitrary and oppressive. *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 489-91 (1914).

In *Danaher, supra*, the Supreme Court reviewed whether a civil punishment was "so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve." *Id.* at 489. On grounds of excessiveness under the Due Process Clause, the Court voided a punitive damages jury award of \$6,300 as "so plainly arbitrary and oppressive as to be nothing short of a taking of [defendant's] property without due process of law." *Id.* at 491.

As *Danaher* well illustrates, due process controls over arbitrary and excessive punishments are not new. See also, *Chicago etc. R. Co. v. Polt*, 232 U.S. 165 (1914); *Missouri Pacific R.R. Co. v. Tucker*, 230 U.S. 340 (1913); *Ex parte Young*, 209 U.S. 123 (1908). They have atrophied, however, through a trend toward passive jury deference.



#### 4. *Judicial Review as a Due Process Safeguard.*

Constitutional restraints against excessive punishments are essentially legal restraints on the human inclination toward vengeance and to inflict retribution. See *Coker v. Georgia*, 433 U.S. 582, 592 (1977). When harm has resulted that cannot be rectified with money, there is an additional element of frustration. Frustration readily becomes fury, which produces irrational results. Large corporations, perceived to have substantial resources, are inevitably targets for vengeance and frustrated fury. The only means available for a jury to express its feelings is awarding huge punitive damages, as it did in this case.

The Due Process Clause, as well as the Excessive Fines prohibition, imposes the rule of law upon the impulse toward vengeance. It requires that an initial exercise of jury discretion be reviewed by the trial judge who, in a cooler interval after trial is over, may determine whether the jury has gone too far. A similar function is required of the appellate court, which must determine whether that reviewing responsibility has been properly performed. These safeguards must not be allowed to atrophy. When they are, a jury is allowed to impose virtually whatever punishment its "sound discretion" may dictate, as happened here.

It is no answer that the law traditionally has allowed juries to exercise discretion in imposing civil punishments. For a long time the law tolerated numerous Constitutional injustices, but the law has come to a better consideration of those problems. So also it should come

to a better consideration of punitive damages. It also is no answer that the legislature can impose limitations upon the imposition of civil punishments. The legislature can do so, and perhaps it will. It is decisional law, however, that now permits juries to award punitive damages bearing no reasonable relationship to the actual harm.

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**AMICUS CURIAE**

**BRIEF**

JAN 19 1989

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OCTOBER TERM, 1988

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PHARMACEUTICAL MANUFACTURERS ASSOCIATION  
AND THE AMERICAN MEDICAL ASSOCIATION,  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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January 19, 1989



**QUESTION PRESENTED**

Whether an award of punitive damages violates the Excessive Fines Clause of the Eighth Amendment.

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**BRIEF OF THE  
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AND THE AMERICAN MEDICAL ASSOCIATION,  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

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**INTEREST OF THE *AMICI CURIAE***

The Pharmaceutical Manufacturers Association (PMA) is a voluntary, nonprofit association representing more than 100 research-intensive companies engaged in the discovery and development of prescription pharmaceutical products. PMA member companies produce the vast majority of the prescription medicines used in the United States. They annually invest more than \$5 billion in research and development. This substantial private research effort is the source of virtually all new drugs marketed in the United States.

The American Medical Association (AMA) is a private, voluntary, nonprofit organization of physicians. It was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, it is the largest health-care organization in the United States, representing the interests of more than 280,000 physicians and their patients in promoting the availability and quality of health care.

*Amici* are concerned because the threat and award of excessive punitive damage judgments against pharmaceutical manufacturers is compromising the industry's research efforts and depriving Americans of significant pharmaceutical therapies. In important areas such as childhood vaccines and drugs for pregnant women, liability concerns already have had a demonstrable negative impact both on research and on the continued availability of beneficial products. These adverse developments have impaired physicians' access to important and often unique pharmaceutical therapies and have thereby interfered with their ability to provide the highest possible quality of medical care to their patients.

In addition, the AMA is concerned that physicians are increasingly being confronted directly with claims for punitive damages by plaintiffs alleging malpractice. Although as a practical matter awards against health-care providers are extremely rare, the availability of unlimited punitive damages remains a serious source of anxiety for them and, like other facets of the medical malpractice crisis, excessive punitive damage awards adversely affect how physicians practice medicine.

Because of the special nature of the pharmaceutical industry, the development and distribution of new drugs have been compromised to an unusual extent by the recent explosion in punitive damage liability. Research and development are expensive, time-consuming tasks. Despite extensive testing and unusually exacting regulation by the federal government, full knowledge of the risks presented by new drugs can never be gained prior

to marketing. In addition, all drugs are associated with adverse events in some patients. These harms cannot be avoided regardless of the degree of care exercised by the manufacturer and the prescriber.

The AMA has studied the effects of product liability on the provision of health care and found that punitive damages and other liability issues "are having a profound negative impact on the development and utilization of potentially life-saving medical technologies."<sup>1</sup> This brief will document the deleterious effects of punitive damages on the availability of pharmaceutical products. *Amici* hope that this additional perspective will assist the Court in appreciating the need for reasonable, ascertainable constitutional standards that limit the award of punitive damages.<sup>2</sup>

### SUMMARY OF ARGUMENT

The use of prescription drug products saves thousands of lives and billions of dollars each year. New drugs are developed almost exclusively by private industry, at an average cost of more than \$100 million from chemical synthesis to approval by the Food and Drug Administration. FDA requires extensive clinical testing prior to marketing, and the agency approves a drug only upon its independent determination that the benefits of the product outweigh its risks.

The pharmaceutical industry's research and drug marketing decisions are particularly vulnerable to distortion from excessive punitive damage awards. All drugs are unavoidably associated with adverse events in some patients; many of these events cannot be discovered prior

<sup>1</sup> AMA Board of Trustees, "Impact of Product Liability on the Development of New Medical Technologies," at 12 (June 1988) [hereinafter cited as *AMA Report*].

<sup>2</sup> Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.



to widespread distribution. The inevitability of injury makes manufacturers repeated targets of lawsuits involving even the safest drugs. Those lawsuits now routinely include multi-million dollar claims for punitive damages, and such punitive damage counts skew the entire course of litigation, increasing both costs and settlement demands.

The result is that pharmaceutical manufacturers have been forced to withdraw beneficial products from the market and to forgo research into new products in particularly litigation-prone areas, such as vaccines and contraceptives. For example, excessive punitive damage awards have been entered in cases where the manufacturer's conduct was approved and indeed required by FDA;<sup>3</sup> where no scientifically plausible relation could be shown between the drug and the injury;<sup>4</sup> and where the plaintiff's attorney had suggested some sort of "formula" by which punitive damages should be calculated.<sup>5</sup>

The prospect of standardless, excessive multi-million dollar punitive damage awards thus taints the entire drug development process. *Amici* suggest that the Court's determination of whether and in what manner the Excessive Fines Clause applies to punitive damage awards should take into account the effect of these awards on the availability of drug therapies. In particular, any award of punitive damages for lawful conduct approved in advance by the FDA must be deemed excessive under the principle of proportionality embodied in the Eighth Amendment; individual punitive damage awards should

<sup>3</sup> See *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, cert. denied, 469 U.S. 965 (1984) (oral contraceptive), discussed at page 20, *infra*.

<sup>4</sup> See cases involving the anti-nausea drug Bendectin, discussed at pages 20-21, *infra*.

<sup>5</sup> See *Chelos v. Endo Laboratories*, No. 87-0113 (Ill. App.) (anti-coagulant drug Coumadin), discussed at page 22, *infra*.

be subject to particularly careful judicial oversight in order to ensure that they do not disserve society's interests in the availability of pharmaceutical products; and the possibility of multiple awards for the same course of conduct must be taken into consideration.

## ARGUMENT

### I. THE NATURE OF THE PHARMACEUTICAL INDUSTRY MAKES IT UNIQUELY VULNERABLE TO EXCESSIVE PUNITIVE DAMAGE AWARDS.

Prescription drug therapies are among the most useful and cost-effective components of medical care.<sup>6</sup> A number of factors, however, create special concerns in this industry with respect to liability in general and punitive damages in particular. *Amici* suggest that, in deciding what constitutional constraints to impose on punitive damages, the Court must be conscious of the need to "vindicate the public's interest in the availability and affordability of prescription drugs."<sup>7</sup>

<sup>6</sup> See, e.g., *Patent Term Extension and Pharmaceutical Innovation: Hearing Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology*, 97th Cong., 2d Sess. 131 (statement of Mr. Hutt) ("The development of new drugs, and new methods of using and making older drugs, represents the single greatest hope of this country for holding down health care costs."). Childhood vaccines, for example, have been conservatively estimated to have a benefit/cost ratio of more than ten to one. See *Hinman, et al.*, "The Opportunity and Obligation to Eliminate Measles From the United States," 242 J. Am. Med. Ass'n 1157 (1979); *Hinman & Koplan*, "Pertussis and Pertussis Vaccine: Reanalysis of Benefits, Risks, and Costs," 251 J. Am. Med. Ass'n 3109 (1984).

<sup>7</sup> *Brown v. Superior Court (Abbott Laboratories)*, 44 Cal. 3d 1049, 1068, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).

### A. Drug Research And Development Is An Expensive And Highly Regulated Enterprise.

New drug development is accomplished in this country almost exclusively by private firms under close regulation by an expert federal regulatory agency, the Food and Drug Administration (FDA). Federal law establishes a system of premarket approval for new drugs to ensure that they are safe and effective.<sup>8</sup> Under this system, FDA, with the advice of outside medical authorities, carefully regulates the premarket testing of new drugs, the approval process, drug manufacturing, labeling and advertising, and post-approval reporting of adverse events.<sup>9</sup> The system is enforced through criminal penalties as well as civil sanctions.<sup>10</sup> The pervasive federal regulation of new drugs is unmatched in any other industry.<sup>11</sup>

The FDA approval process consumes an average of more than eight years between the discovery and syn-

<sup>8</sup> See 21 U.S.C. § 355.

<sup>9</sup> See 21 U.S.C. §§ 351-355; 21 C.F.R. Parts 200 *et seq.* FDA also imposes analogous regulatory requirements on biological products such as vaccines, pursuant to section 351 of the Public Health Service Act, 42 U.S.C. § 262.

<sup>10</sup> See, e.g., 21 U.S.C. § 333(a)(2) (felony violations punishable by imprisonment for not more than three years or a fine of not more than \$10,000 or both); *id.* § 333(a)(1) (misdemeanor violations); *id.* § 332 (injunction proceedings); *id.* § 334 (seizures).

<sup>11</sup> See generally Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology, "The Food and Drug Administration's Process for Approving New Drugs," 96th Cong., 2d Sess. 21 (Comm. Print 1980) [hereinafter cited as *FDA Approval Process*] ("the FDA product approval process has become far more sophisticated than the approval process for most other products and also more cumbersome").

thesis of a new chemical entity and its approval for marketing.<sup>12</sup> The cost of bringing a single new drug to market has been estimated at more than \$100 million.<sup>13</sup> In addition, pharmaceutical firms bear significant business risks during the development process: only one out of every 10,000 tested chemical compounds ultimately is approved for marketing.<sup>14</sup>

### B. Prescription Drugs Inevitably Cause Harm To Some Patients.

The extensive regulation of new drugs is justified by their potential for harm.<sup>15</sup> As a leading medical textbook on drug therapy states, "[v]ery few physicians believe that any drug \* \* \* is free of toxic effects."<sup>16</sup> FDA

<sup>12</sup> See Young, "The Reality Behind the Headlines," in *From Test Tube to Patient: New Drug Development in the United States* (Jan. 1988), at 5 [hereinafter cited as *New Drug Development*]. The author is Commissioner of Food and Drugs.

<sup>13</sup> See Cohn, "The Beginnings: Laboratory and Animal Studies," in *New Drug Development*, *supra*, at 9; *Drug Price Competition and Patent Term Restoration Act of 1984: Hearing Before the Senate Comm. on Labor and Human Resources*, 98th Cong., 2d Sess. 106 (1984).

<sup>14</sup> See *Innovation and Patent Law Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 1206 (1984). Even among the compounds that survive preclinical testing and are then tested in humans, only 20% ultimately are approved. See Flieger, "Testing in 'Real People,'" in *New Drug Development*, *supra*, at 14.

<sup>15</sup> Federal law expressly refers to the "toxicity or other potentiality for harmful effect" of prescription drugs. 21 U.S.C. § 353(b)(1)(B).

<sup>16</sup> A. Gilman, *et al.*, *Goodman and Gilman's The Pharmacological Basis of Therapeutics* 59 (7th ed. 1985) [hereinafter cited as *Goodman and Gilman*].

agrees that "there is no such thing as absolute safety in drugs."<sup>17</sup> For example, at least 300 persons die each year from anaphylactic reactions to penicillin.<sup>18</sup> Prescription drugs are perhaps the clearest example of products that are "unavoidably unsafe" as defined in comment k to section 402A of the *Restatement (Second) of Torts*.<sup>19</sup>

<sup>17</sup> *Hearings on Drug Safety Before the Subcomm. on Intergovernmental Relations of the House Comm. on Government Operations*, 88th Cong., 2d Sess., pt. 1, at 147 (1964) (testimony of former FDA Commissioner Larrick) [hereinafter cited as *Drug Safety Hearings*].

<sup>18</sup> See *Goodman and Gilman, supra*, at 1135. Physicians are well-aware of the possibility of anaphylaxis following penicillin administration, and a warning concerning this reaction is prominently featured in the drug's labeling. Nonetheless, it is impossible to predict whether a particular person will suffer such a reaction, and it can therefore be avoided for certain only by forgoing penicillin therapy altogether. The number of deaths from penicillin anaphylaxis represents only 0.001% of patients who are treated with the drug. *Id.*

<sup>19</sup> See, e.g., *Brown v. Superior Court (Abbott Laboratories)*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988). Comment k provides:

*Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assur-

FDA makes an expert determination of whether a new drug's benefits outweigh its risks before approving the drug for marketing:

Although no provision of the Federal Food, Drug, and Cosmetic Act provides that the FDA may approve a drug only if the benefits outweigh the risks, this inevitably is the crux of any decision to permit a new drug to be marketed or to allow an old one to remain on the market.<sup>20</sup>

This risk-benefit determination is made on the basis of all available information, but that information is necessarily incomplete. Despite premarket clinical testing in thousands of patients, many reactions are so rare that typically one-half or more of a new drug's adverse reactions cannot be discovered until after it is on the market and in widespread use.<sup>21</sup> As the Institute of Medicine observed with respect to new childhood vaccines, "it will

ance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

*Restatement (Second) of Torts* § 402A, comment k (emphasis in original).

<sup>20</sup> Merrill, "Compensation for Prescription Drug Injuries," 59 Va. L. Rev. 1, 10 (1973), citing *Drug Safety Hearings, supra*, at 150. The author is a former FDA Chief Counsel. Accord, *Goodman and Gilman, supra*, at 57; Farley, "Benefit vs. Risk: How FDA Approves New Drugs," in *New Drug Development, supra*, at 27. FDA's risk-benefit determination is grounded in the statutory requirements that new drugs be safe and effective. See *FDA Approval Process, supra*, at 21.

<sup>21</sup> See *Goodman and Gilman, supra*, at 51; Merrill, "Compensation for Prescription Drug Injuries," *supra*, 59 Va. L. Rev. at 10.



be exceptionally difficult to define the frequency (if any) of rare but potentially catastrophic reactions without administration of the vaccine to millions of children."<sup>22</sup> In addition, beyond the sheer difference in numbers involved, clinical trials are limited in their predictive capabilities because controlled experimental conditions are not duplicated in the typical physician's day-to-day practice.<sup>23</sup>

Accordingly, pharmaceutical manufacturers place their products on the market with full knowledge that some persons unavoidably will be injured, that the number of injured persons could well be quite large once hundreds of thousands or millions of persons are prescribed a particular drug in the regular course of medical practice, and that not all of the drug's possible adverse reactions have in fact been identified in the clinical trials. FDA's approval certifies that an unbiased expert regulatory body has concluded that these risks are outweighed by the drug's therapeutic benefits, and thus represents society's judgment that a particular drug should in fact be marketed.

In making this judgment, FDA must take into account not only the possibility of adverse reactions if a drug is marketed, but also the many thousands of lives that could be endangered and even lost if a drug is *not* approved for use. FDA has been extraordinarily conservative in approving new drugs, and in fact many important therapies are not made available in the United States until years after they have been approved in other western countries.<sup>24</sup> As a congressional report observed:

<sup>22</sup> 1 Institute of Medicine, *New Vaccine Development: Establishing Priorities* 179 (1985).

<sup>23</sup> See Goodman and Gilman, *supra*, at 51 ("The results of clinical trials \* \* \* may have severe limitations in terms of what can be expected of drugs when they are used in an office practice.").

<sup>24</sup> See, e.g., General Accounting Office, "FDA Drug Approval—A Lengthy Process That Delays the Availability of Important New

[D]elays in the approval of a drug deprive the sick from medicines which are life-saving, reduce suffering, and/or help maintain a productive life. Therefore, any protection conferred by delaying the introduction of new drugs must be weighed against the therapeutic losses incurred by delaying effective new therapies.<sup>25</sup>

Limited testing cannot proceed indefinitely without endangering many more lives than might be saved by a more complete data base. There comes a point when the agency, in its expert judgment, concludes that a drug presents a sufficiently favorable benefit-risk profile that it ought to be made available generally to physicians and their patients.

#### C. The Routine Presence Of Punitive Damage Counts Has Particularly Undesirable Consequences For Pharmaceutical Product Liability Litigation.

Despite the societal judgment that a drug should be marketed, the inevitability of injury assures that pharmaceutical manufacturers will be repeated targets of personal injury actions. And while extensive federal oversight and the standards of the health-care industry can

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Drugs" (1980). FDA recently issued an interim rule "designed to speed the availability of new therapies for desperately ill patients, while preserving appropriate guarantees for safety and effectiveness." The agency recognized that "physicians and patients are generally willing to accept greater risks or side effects from products that treat life-threatening and severely-debilitating illnesses, than they would accept from products that treat less serious diseases." FDA, "Investigational New Drug, Antibiotic, and Biological Drug Product Regulations; Procedures for Drugs Intended To Treat Life-Threatening and Severely Debilitating Illnesses," 53 Fed. Reg. 41516 (Oct. 21, 1988).

<sup>25</sup> FDA *Approval Process*, *supra*, at 31. This report provides examples of delays in the approval of important cardiovascular, neurological, respiratory, gastrointestinal, cancer, and other drugs. See *id.* at 35-51.

be expected to ensure that the sort of reprehensible conduct meriting punitive damages will be rare,<sup>26</sup> plaintiffs' lawyers apparently feel otherwise.<sup>27</sup> In fact, punitive damage counts have become a routine feature of complaints against pharmaceutical manufacturers.<sup>28</sup>

The mere presence of punitive damage counts has a pernicious effect on the entire course of drug product liability litigation. As is true with respect to many other industries, these counts are only rarely dismissed on summary judgment and typically survive to trial. Punitive damage claims therefore have caused dramatic rises in settlement costs and in litigation costs generally for pharmaceutical manufacturers. The unique nature of pharmaceutical litigation, however, gives rise to especially undesirable consequences from punitive damage claims in lawsuits involving these products.

For example, drug product liability cases raise complex medical questions that are extraordinarily difficult for lay juries to resolve, guided as they are only by their common sense and the opposing testimony of experts retained by the parties. Juries in pharmaceutical cases are

<sup>26</sup> See, e.g., *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840-841 (2d Cir. 1967) ("A manufacturer distributing a drug to many thousands of users under government regulation scarcely requires this additional measure [i.e., punitive damages] for manifesting social disapproval and assuring deterrence.") (Friendly, J.).

<sup>27</sup> See generally P. Huber, *Liability: The Legal Revolution and Its Consequences* 129 (1988) ("Before long, juries were levying punitive damages, ostensibly grounded in outrageous misconduct, for acts that federal regulators had specifically contemplated and approved.").

<sup>28</sup> A review of reported pharmaceutical product liability cases reveals the following. During the period 1970-1979, claims for punitive damages are reflected in six decisions, fewer than one per year. During the next five years (through 1984), 17 such decisions have been found, a six-fold increase. This number has more than doubled again to 35 reported decisions in the past four years, an incidence approximately 15 times greater than in the 1970s.

therefore particularly susceptible to being "unfairly influenced" in their determination of liability for (and the amount of) compensatory damages by "irrelevant and prejudicial factors" relating solely to punitive damages.<sup>29</sup> In addition, the inevitability of injury—which is generally well-documented in the pharmaceutical manufacturer's files<sup>30</sup>—may be regarded by the jury as evidence of obduracy or even malice on the part of the defendant, increasing the likelihood that punitive damages may be awarded.<sup>31</sup>

While the harm resulting from a single excessive punitive damage award is a serious concern, the nature of the pharmaceutical industry is such that, as a matter of course, manufacturers face multiple claims for punitive damages from the same product. The unavoidably unsafe nature of pharmaceutical products and the large numbers of persons who use these products ensure that numerous lawsuits may be brought with respect to any particular drug. The manufacturer may therefore be exposed to "potentially ruinous"<sup>32</sup> multiple punitive damage claims arising out of what is essentially a single course of conduct. These claims arise in many different

<sup>29</sup> H.R. Rep. No. 908, 99th Cong., 2d Sess., pt. 1, at 28 (1986) [hereinafter cited as *House Vaccine Report*]. Congress has therefore recently provided for trifurcated trials in cases involving certain childhood vaccines administered after October 1, 1988. See 42 U.S.C. § 300aa-23 (trials conducted in three stages: liability, general damages, and punitive damages).

<sup>30</sup> Manufacturers must develop and retain extensive information on drug adverse events. See 21 C.F.R. §§ 312.32-312.33, 314.80.

<sup>31</sup> See P. Huber, *supra*, at 120 (Manufacturers have come to be regarded as "close to malevolent in their callousness: They knew accidents like this were going to happen, but they still declined to take measures needed to prevent the latest one.") (emphasis in original).

<sup>32</sup> Jeffries, "A Comment on the Constitutionality of Punitive Damages," 72 Va. L. Rev. 139 (1986).



states and are subject to decision under many different legal standards. More than twenty years ago, Judge Friendly first described the "legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs" in pharmaceutical litigation.<sup>33</sup> The lower courts have failed to move toward any coherent solution to these "staggering"<sup>34</sup> difficulties. While this case does not present the multiple-claimant problem, we urge that the Court's development of standards under the Excessive Fines Clause must take into account the special dangers inherent in such a situation.

\* \* \*

In summary, the nature of the pharmaceutical industry makes punitive damages singularly inappropriate as well as particularly burdensome. At every step of the drug research and development process, a balance must be struck between unavoidable risks and health-care benefits.<sup>35</sup> The balance is struck in the first instance by the manufacturer, is subject to careful scrutiny and *de novo* determination by an expert regulatory body, and is then individualized for each patient by the prescribing physician.

Private investment decisions totaling billions of dollars annually and directly affecting the quality and cost of health care in this nation rest on how this balance is struck. Excessive, routine punitive damage claims and

<sup>33</sup> *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

<sup>34</sup> *Id.*

<sup>35</sup> See, e.g., *FDA Approval Process*, *supra*, at 51:

It must be remembered that all drugs have serious potential side effects and all drugs are capable of serious harm if misused or abused. Therefore, safety is relative and both patients and regulators must assume some risk. Levels of public expectations and regulatory goals must be modified to appreciate the necessary balancing of benefits and risks in advancing new and effective drug therapies.

awards—stripped from their historical context of punishing rare, outrageous conduct—skew the balance by introducing a wild card: the possibility that multi-million dollar penalties might be imposed by lay juries for perfectly lawful conduct involving beneficial medicines. As we discuss below, the distortion introduced by such excessive punitive damage claims and awards has deprived patients of significant existing therapies and has inhibited research and development concerning new therapies.

## II. EXCESSIVE PUNITIVE DAMAGE AWARDS AND CLAIMS HAVE ADVERSELY AFFECTED THE AVAILABILITY AND DEVELOPMENT OF PHARMACEUTICAL THERAPIES.

A recent report of the AMA Board of Trustees found that the system for determining liability, of which punitive damages is a significant part, is "having a profound negative impact on the development of new medical technologies."<sup>36</sup> The report continued:

Innovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance. Certain older technologies have been removed from the market, not because of sound scientific evidence indicating lack of safety or efficacy, but because product liability suits have exposed manufacturers to unacceptable financial risks.<sup>37</sup>

An FDA expert advisory panel,<sup>38</sup> the American Academy

<sup>36</sup> *AMA Report*, *supra*, at 1. Although the Board of Trustees did not focus exclusively upon the punitive damages component of the liability system, there is no question that punitive damages play a major role in causing the "negative impact" on medical technology decried by the Board in its report.

<sup>37</sup> *Id.*

<sup>38</sup> FDA, "Biological Products: Bacterial Vaccines and Toxoids; Implementation of Efficacy Review," 50 Fed. Reg. 51002, 51006 (Dec. 13, 1985) ("attempts to improve vaccines further will be



of Pediatrics,<sup>39</sup> the Institute of Medicine,<sup>40</sup> and commentators<sup>41</sup> agree that these concerns have impeded pharmaceutical research and development.

A robust private research effort is desirable not only to discover therapies for presently untreatable diseases, but also to improve upon existing drugs by finding safer and more effective alternatives.<sup>42</sup> By inhibiting medical research, punitive damages and other liability concerns unduly restrict the physician's armamentarium and consequently the patient's prospects for recovery. These issues have been especially significant with respect to vaccines, contraceptives, and drugs for pregnant women, as we document below.

#### A. Vaccines

Vaccines, particularly those for childhood diseases, "are one of the great success stories of medicine."<sup>43</sup>

hampered" by tort liability) (report of the Advisory Panel on Review of Bacterial Vaccines and Toxoids).

<sup>39</sup> *Vaccine Injury Compensation: Hearing Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 115 (1986) (statement of Dr. Martin H. Smith, President, American Academy of Pediatrics) ("research efforts for new and improved vaccines have been chilled" because of liability concerns).

<sup>40</sup> Institute of Medicine, *Vaccine Supply and Innovation* 11 (1985) ("apprehensions [concerning liability] are a disincentive to investment in the development of new (or improved) immunizing agents") [hereinafter cited as *Vaccine Supply*]; *id.* at 2 (resolution of liability issues necessary so that "the potential of new technologies [may] be fully realized").

<sup>41</sup> *E.g.*, P. Huber, *supra*, ch. 10.

<sup>42</sup> *See, e.g., id.* at 160-161 ("[N]ewer is generally safer than older in the modern technological world. \* \* \* There is hardly a product in use today [including drugs and vaccines] that is not many times safer than its counterpart of a generation or even a decade ago.").

<sup>43</sup> *AMA Report, supra*, at 6. *See also, e.g., House Vaccine Report, supra*, pt. 1, at 4 (childhood immunization is "one of the most

Most domestic manufacturers, however, have stopped producing and distributing childhood vaccines.<sup>44</sup> More than half of the vaccine producers licensed in 1968 have ceased production,<sup>45</sup> and this country is now "heavily dependent on sole suppliers" for many pediatric vaccines.<sup>46</sup> The primary cause of this precipitous decline in our vaccine production capacity has been "the liability situation and its consequences (i.e., litigation costs or difficulty in obtaining insurance coverage)."<sup>47</sup>

The vaccine liability crisis is well-established. There are hundreds of suits pending, with damage claims, including punitive damages, totaling several billion dollars.<sup>48</sup> This figure is more than 10 times the annual

spectacularly effective public health initiatives this country has ever undertaken," having "prevented thousands of children's deaths each year" and saved "[b]illions of medical and health-related dollars").

<sup>44</sup> *See, e.g., id.* In addition, foreign manufacturers are reluctant to enter the United States market because of liability concerns. *See, e.g., Vaccine Supply, supra*, at 5.

<sup>45</sup> *Id.* at 46.

<sup>46</sup> *Id.* at 5. *See also House Vaccine Report, supra*, pt. 1, at 7 ("Currently, there is only one manufacturer of the polio vaccine, one manufacturer of the measles, mumps, rubella (MMR) vaccine, and two manufacturers of the [pertussis] vaccine.").

<sup>47</sup> *Vaccine Supply, supra*, at 11.

<sup>48</sup> *See, e.g., Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, "Childhood Immunizations," 99th Cong., 2d Sess. 85-86. An illustrative case is *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 718 P.2d 1318 (1986). There, a jury awarded the plaintiff \$10 million in damages, including \$8 million in punitive damages, for injuries arising out of administration of the Sabin live-virus polio vaccine. The basis for the complaint was that use of the Salk killed-virus vaccine rather than the Sabin vaccine would have prevented the plaintiff's injury. The enormous punitive damage award was imposed, notwithstanding the conclusion of federal public health experts and other medical authorities that the Sabin vaccine is superior and the manufac-

sales for the entire vaccine industry.<sup>49</sup> In short, routine punitive damage claims require manufacturers "to engage in a gamble with very large financial stakes. . . . The only way to eliminate the risk is to stop manufacturing the vaccine."<sup>50</sup> As discussed above, that is precisely what most manufacturers have done.<sup>51</sup>

turer's reliance on governmental immunization initiatives recommending the production and use only of the Sabin vaccine. The judgment ultimately was set aside on appeal, but only by the narrowest of margins in the Supreme Court of Kansas (4-3). The fact that a punitive damage claim could seriously be entertained in these circumstances, much less survive through trial and virtually through appeal as well, is clear evidence of the liability risks and litigation costs that are borne by vaccine manufacturers as a result of the lack of ascertainable standards governing imposition of punitive damages.

<sup>49</sup> See *Vaccine Supply*, *supra*, at 45-46. See also P. Huber, *supra*, at 166-167 ("In 1986, a new claim was being filed against the manufacturers of whooping cough vaccine every week; one former manufacturer faced 100 suits demanding more than \$2 billion in compensation, or 200 times the total annual sale revenues of the vaccine.").

<sup>50</sup> *Vaccine Supply*, *supra*, at 10, 117-118.

<sup>51</sup> Congress recently acted to establish a compensation system for persons injured by certain childhood vaccines. See National Childhood Vaccine Injury Act of 1986, as amended by the Vaccine Compensation Amendments of 1987, 42 U.S.C. §§ 300aa-1 *et seq.* Under this system, persons dissatisfied with a no-fault award from a compensation fund may reject the award and sue the manufacturer, but punitive damages may not be awarded in the absence of proof that the manufacturer wrongfully withheld information from FDA or engaged in similar unlawful conduct. 42 U.S.C. § 300aa-23(d)(2). Congress expressly found that punitive damages should not otherwise be imposed:

Where a manufacturer has attempted in good faith to comply with a government standard—even if the standard provides inadequate protection to the public—the manufacturer should not be assessed punitive damages absent evidence that it engaged in reprehensible behavior that directly resulted in the [initial or continued approval of the vaccine].

*House Vaccine Report*, *supra*, pt. 1, at 28. While salutary, this development is unfortunately of limited utility. It covers only a

Most recently, the manufacturer of the vaccine for Japanese encephalitis ceased distribution because it could not obtain "appropriate liability insurance, and there was no statutory mechanism for absolving it of liability."<sup>52</sup> The unavailability of the vaccine put Americans traveling to certain areas of Asia at increased risk for this disease.

## B. Contraceptives And Drugs For Pregnant Women

The adverse impact of excessive punitive damage claims and awards also has been keenly felt by manufacturers of contraceptives and drugs for pregnant women. The AMA has documented the dramatic drop in basic research in this area:

In the early 1970s, there were 13 pharmaceutical companies actively pursuing research in contraception and fertility. Now, only one US company conducts contraceptive and fertility research. Unless the liability laws are drastically altered, it is very unlikely that pharmaceutical companies will aggressively pursue research in this area.<sup>53</sup>

Another study confirms that private domestic research expenditures on contraceptives declined by 90% in the decade following their peak in 1973, and that "no truly new contraceptive chemical entities have been introduced since 1968."<sup>54</sup> Innovation also has virtually ceased with

small number of vaccines, and even as to those it applies only to claims arising out of administrations after October 1, 1988. The statute does not and was not intended to address the larger constitutional issues concerning the award of punitive damages in pharmaceutical cases.

<sup>52</sup> Marcus, "Liability for Vaccine-Related Injuries," 318 N. Eng. J. Med. 191 (1988).

<sup>53</sup> *AMA Report*, *supra*, at 9.

<sup>54</sup> P. Huber, *supra*, at 155.

respect to drugs for use by pregnant women, again because of liability concerns.<sup>85</sup>

The observation that "punitive damages are out of control"<sup>86</sup> is perhaps nowhere as apt as in these areas. In *Wooderson v. Ortho Pharmaceutical Corp.*,<sup>87</sup> for example, the plaintiff was awarded \$4.75 million in damages, including \$2.75 million in punitive damages, for kidney damage alleged to have been caused by an oral contraceptive. The award was upheld, even though the FDA had expressly refused to approve the addition of a warning because of the lack of scientific evidence supporting causation and the defendant could have been in violation of federal law had it done so.<sup>88</sup>

The loss of valuable therapies as a result of punitive damages and other liability concerns is particularly striking in the case of Bendectin, an anti-nausea medication useful for pregnant women. Notwithstanding the "nearly universal scientific consensus" that Bendectin does not cause birth defects,<sup>89</sup> the manufacturer was

<sup>85</sup> See *id.*

<sup>86</sup> Jeffries, *supra*, 72 Va. L. Rev. at 139.

<sup>87</sup> 235 Kan. 387, 681 P.2d 1038, *cert. denied*, 469 U.S. 965 (1984).

<sup>88</sup> See Brief Amicus Curiae of the PMA in Support of Petition for a Writ of Certiorari, No. 84-290, at 14-19.

<sup>89</sup> *Richardson v. Richardson-Merrell, Inc.*, 649 F. Supp. 799, 803 (D.D.C. 1986), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988). Following public hearings and an extensive review of the evidence, FDA's Fertility and Maternal Health Drugs Advisory Committee—an independent expert panel composed of physicians, scientists and a consumer representative, and advised by scientists from the National Institutes of Health—concluded in 1980 that there is no increased incidence of birth defects resulting from exposure to Bendectin. FDA announced its agreement with this finding, and the agency has stood by it ever since. See *id.*

When the scientific studies have been presented dispassionately at trial, untainted by the understandably moving evidence of the children's birth defects or by evidence purportedly going to punitive

besieged by lawsuits and ultimately ceased distribution of the product in 1983.<sup>90</sup> Punitive damage claims have been a routine part of Bendectin litigation, and jury awards of such damages are disconcertingly common, while the judicial response has been inconsistent.<sup>91</sup> The litigation surrounding Bendectin has ill-served the patient population. As the American College of Obstetricians and Gynecologists concluded, the loss of Bendectin "creates a significant therapeutic gap" for the treatment of pregnant women, and in its absence "severe cases [of nausea and vomiting during pregnancy] have led to serious maternal nutritional as well as other deficiencies." <sup>92</sup>

### C. Other Drug Products

Many other drug products have been the subject of multi-million dollar punitive damage awards and routine claims for such amounts. These cases confirm the lessons from the products already discussed: punitive damages

damages, the jury has determined that Bendectin does not cause birth defects. See *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, No. 88-704 (Jan. 9, 1989) (in 22-day bifurcated trial of more than 800 consolidated cases, solely on the issue of causation, jury concluded that plaintiffs had not established that Bendectin is a proximate cause of human birth defects).

<sup>90</sup> See, e.g., *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988).

<sup>91</sup> For example, the jury in *Ealy v. Richardson-Merrell, Inc.*, No. 83-3504 (D.D.C. Oct. 1, 1987), awarded \$75 million in punitive damages, which the district court remitted in its entirety because of the lack of any evidence of wrongful conduct on the part of the defendant. Other trial courts, however, have upheld punitive damage awards in Bendectin cases. See *Blum v. Merrell Dow Pharmaceuticals, Inc.*, No. 1027 (Penn. Ct. of Common Pleas May 12, 1988), *appeal pending*, No. 1813 (Super. Ct.); *Brock v. Merrell Dow Pharmaceuticals, Inc.*, No. L-83-148-CA (E.D. Tex. Mar. 4, 1988), *appeal pending*, No. 88-2311 (5th Cir.).

<sup>92</sup> *AMA Report, supra*, at 11 (citation omitted).



are imposed on facts far removed from what historically was required for such extraordinary awards, they distort incentives for research and development, and they ultimately deprive patients of significant pharmaceutical therapies.

In a case involving the widely-prescribed anti-coagulant drug Coumadin (warfarin sodium), for example, a jury awarded more than \$26 million in punitive damages for injuries resulting from a necrotic reaction, a rare and unavoidable side effect.<sup>63</sup> Although the FDA-approved package insert warned of necrosis, the plaintiff argued that the warning should have been more specific and that additional reports should have been made to the agency. The plaintiff further suggested to the jury a formula for determining punitive damages, amounting to 20-30 cents per day for each person purportedly at risk for the reaction as a result of Coumadin therapy during the years 1965 through 1977. The \$26 million punitive damage award, which the trial court later remitted to \$13 million, fell within the range resulting from reliance on the plaintiff's formula.

The threat of excessive punitive damage awards adversely affects the availability of important new therapies even where no awards involving a particular product actually have been entered. For example, distribution of the investigational drug botulinum, the only available treatment for certain eye conditions, was halted as a result of liability concerns.<sup>64</sup> Similarly, small biotechnology firms, which often are at the cutting edge of innovation, have reported that product liability issues have a signi-

<sup>63</sup> *Chelon v. Endo Laboratories, Inc.*, No. 87-0113 (11<sup>th</sup> App.). The case was settled on confidential terms before argument in the Appellate Court.

<sup>64</sup> See *AMA Report*, *supra*, at 11.

ficant, untoward impact on decisions concerning research and commercial development of new products.<sup>65</sup>

### III. CONSTITUTIONAL STANDARDS LIMITING THE AWARD OF PUNITIVE DAMAGES ARE NECESSARY.

While the case before the Court may appear far removed from the context of pharmaceutical product liability litigation, the Court's decision will undoubtedly have a significant effect on this litigation. A refusal to undertake constitutional scrutiny for excessiveness would send precisely the wrong message: that pharmaceutical manufacturers are fair game for whatever multi-million dollar awards can be coaxed from sympathetic juries or pried from defendants in settlement. That message has been sent repeatedly by the lower courts. Should it receive this Court's imprimatur, the distorting effect of excessive punitive damages will be substantially increased. The predictable result will be needless losses to patients, as beneficial therapies are withdrawn from the market and pharmaceutical research and development expenditures are directed toward other areas.

*Amici* suggest that the constitutional standards enunciated by the Court in this case should take account of three factors particularly affecting the pharmaceutical industry. While other constitutional provisions, not at issue in this case, also certainly are relevant to these concerns, we believe that they are encompassed within-

<sup>65</sup> See *id.* The loss of beneficial products can occur without actually driving a particular manufacturer entirely out of business. It is enough if the threat or award of punitive damages causes a defendant to abandon a particular product or class of products. If an important pharmaceutical therapy is lost, it does not matter whether it is lost because punitive damages have ruined a small producer or have caused a larger company to abandon the product or area in favor of less risky avenues of research and development. In either case, the negative impact on the public health is the same.

and merit consideration under the Eighth Amendment as well.

*First*, although there are a variety of potentially relevant measures of excessiveness, one of the core concepts embodied in the Eighth Amendment is the notion of proportionality between the defendant's activities and the penalty imposed. Under this principle, unusually close scrutiny for excessiveness is appropriate in the pharmaceutical field because the defendant has engaged in lawful conduct approved in advance by an expert regulatory body. Absent clear proof that the defendant committed an unlawful act in regard to obtaining FDA approval, which was material to the harm in question, any punitive damage award is "excessive" in relation to the conduct of the pharmaceutical manufacturer in placing an approved drug on the market.<sup>66</sup>

*Second*, punitive damage awards are excessive when they do not serve society's interests. Awards that discourage basic pharmaceutical research and that lead to the withdrawal of beneficial therapies are excessive, and each individual award must be assessed in this light to protect the interests of all patients. Surely the Constitution demands more of judges than that they permit juries to render excessive awards at such great cost to innocent patients and society at large.

*Third*, where a single product or course of conduct may give rise to multiple claims for punitive damages, particularly careful judicial scrutiny is required to ensure that the awards are not excessive. Pharmaceutical manufacturers are especially vulnerable to such multiple claims because their products are used by thousands or

<sup>66</sup> *Cf.* *Solem v. Helm*, 463 U.S. 277, 287 (1983) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."), *quoting* *Robinson v. California*, 370 U.S. 660, 667 (1962).

millions of patients, and injuries to some of them are unavoidable.

## CONCLUSION

The judgment of the court of appeals should be reversed.

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**AMICUS CURIAE**

**BRIEF**



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No. 88-556

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

Browning-Ferris Industries of Vermont, Inc., and  
Browning-Ferris Industries, Inc.,  
*Petitioners,*  
v.

Kelco Disposal, Inc., and Joseph Kelley,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND BRIEF AMICUS CURIAE OF THE GOODYEAR  
TIRE & RUBBER COMPANY IN SUPPORT OF THE  
PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
OF THE GOODYEAR TIRE & RUBBER COMPANY  
IN SUPPORT OF THE PETITIONERS

---

Pursuant to Rule 36.3 of the rules of this Court, The Goodyear Tire & Rubber Company ("Goodyear") respectively moves for leave to file the attached brief *amicus curiae* in support of the petitioners. Petitioners have consented to the filing of this brief. This motion is made necessary by the refusal of respondents to provide consent.

Goodyear is presently before this Court as petitioner in *The Goodyear Tire & Rubber Co. v. Hodder*, petition for

*cert. filed*, Oct. 14, 1988 (No. 88-626), *stay granted*, Oct. 24, 1988 (A-296) (O'Connor, Circuit Justice). In that case, the Supreme Court of Minnesota imposed a \$4,000,000 punitive damage award on Goodyear. In the Minnesota courts and this Court, Goodyear has challenged the constitutionality of that punitive fine under the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. In Question 3 of its petition, Goodyear presents the question whether the Excessive Fines Clause of the Eighth Amendment applies to punitive damage awards rendered in civil cases and whether the \$4,000,000 award is violative of that Clause.

Unless the Court determines in the case at bar that the failure of Vermont law to establish a limit on the maximum punitive damage award imposable on petitioners precludes any punitive damage award, the Court will presumably establish in this case a standard for determining whether a particular punitive damage award is excessive under the Excessive Fines Clause. Goodyear wishes to address the standard that the court should adopt.

Petitioners in this case suggest in their petition that the "ratio" between a punitive damage award and the compensatory damage award in the same case is relevant to, although not dispositive of, the constitutional excessiveness of the punitive award. Goodyear argues in the attached brief that this "ratio" is historically and analytically irrelevant to the question of excessiveness under the Excessive Fines Clause, that it focuses on the private injury rather than the public wrong, that use of such a ratio would produce irrational results, and that the appropriate test for excessiveness should focus primarily on the nature of the public wrong and the legislatively prescribed monetary punishments for similar conduct. Because any test the Court formulates for determining excessiveness will presumably be applied to all punitive damage cases, Goodyear believes the Court should have before it the full range of arguments when it fashions that test, which will un-

doubtedly have a direct impact both on the disposition of the case at bar and on all other punitive damage cases.

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### Questions Presented

The Court has granted certiorari on the question whether the Excessive Fines Clause of the Eighth Amendment applies to punitive damage awards imposed in civil cases. If this question is answered in the affirmative, the Court will presumably formulate a standard under which the constitutional excessiveness of punitive damage awards in this and other cases may be decided. The Goodyear Tire & Rubber Company, as *amicus curiae*, will address the following questions:

1. Whether the Excessive Fines Clause of the Eighth Amendment should be held to require that a punitive damage award be proportionate to the monetary penalties exacted by the state legislature for the underlying acts of misconduct.

2. Whether the relationship or ratio between the punitive and compensatory damage awards in a particular case should, as a matter of analysis or historical practice, have any bearing on the question whether a punitive damage award violates the Excessive Fines Clause.

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T. Sedgwick, <i>Measure of Damages</i> (9th ed. 1912) .....	21,22,23
F. Thompson, <i>Magna Carta: Its Role in the Making of the English Constitution 1300-1629</i> (1948) ..	7,14

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**BRIEF OF THE GOODYEAR TIRE &  
RUBBER COMPANY AS AMICUS CURIAE  
IN SUPPORT OF THE PETITIONERS**

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**INTEREST OF THE AMICUS CURIAE**

*Amicus curiae*, The Goodyear Tire & Rubber Company ("Goodyear"), manufactures, distributes and sells products and services necessary to the operation, maintenance and repair of vehicles. In a case presently on this Court's docket, Goodyear seeks review of a decision of the Supreme Court of Minnesota in which that court announced a new substantive legal standard of conduct and imposed on Goodyear a \$4,000,000 punitive damage assessment for having deviated from that standard in connection with an accident that had occurred seven years earlier. *The Goodyear Tire & Rubber Co. v. Hodder*, No. 88-626, petition for cert. filed, Oct. 14, 1988, stay granted, Oct. 24, 1988 (O'Connor, Circuit Justice) (A-296).

The product that led to the injury in the *Goodyear* case had been manufactured and sold twenty-five years prior to the accident. It was neither defectively designed nor manufactured and was found by the jury to have outlived its useful life. Goodyear's liability was predicated on the theory that it had, in 1981, breached a continuous post-sale legal duty to warn potential users of its product that misuse of the product could cause injury, a theory that had not been submitted to the jury. The jury's compensatory damage verdict was for \$3,368,916.

On appeal, the Supreme Court of Minnesota upheld Goodyear's liability for compensatory damages in the amount determined by the jury. However, it set aside the jury's punitive damage award as having been based upon



an improper legal theory. It reviewed the record and imposed, *de novo*, a \$4,000,000 punitive damage award. In determining an appropriate punitive damage award, the court purported to apply a statute, *Minn. Stat.* § 549.20(3), under which a variety of subjective factors are to be considered in assessing the size of a punitive damage award. Those factors do not, on the face of that statute, include proportionality between the compensatory award and the ultimate punitive award.

In the case now before the Court, a Vermont jury awarded respondents approximately \$51,000 in compensatory damages and \$6,000,000 in punitive damages under a state common law tort theory. Petitioners pointed out in their petition for certiorari that this punishment, well over 100 times greater than the actual damages assessed, "greatly exceeded the harm done" to the respondents. As Goodyear shall demonstrate below, the courts of many jurisdictions have adopted as one of several legal standards for determining the propriety, under state law, of the size of a punitive damage award a test that looks to the relationship or proportionality between punitive and compensatory awards in the same case. As Goodyear shall show, there is no constitutional basis for looking to the relationship between the punitive and compensatory awards in a case, and a test based upon such a relationship would not rationally serve the goals of retribution and deterrence underlying punitive damage theory. Rather, the proportionality calculation has been employed by courts where its application yielded results those courts regarded as felicitous and has been as readily ignored by the same courts when its application proved infelicitous. Goodyear submits that the facts of its case presently before the Court enable it to articulate the reasons why the Court should reject the "reasonable relationship" test and adopt a more rational, reliable and consistent standard for determining excessiveness under the Excessive Fines Clause of the Eighth Amendment.

## SUMMARY OF ARGUMENT

A punitive damage award will generally not be constitutionally "excessive" if the jurisdiction in which the award has been imposed has enacted a statute setting forth the maximum possible fine for clearly defined conduct that will result in punitive damages and the award does not exceed that maximum. That process would be expected to produce fair, relatively uniform and predictable results, would be supported by the practice observed under the lineal antecedents of the Excessive Fines Clause, would be consistent with and implement the theory of punitive damages, and would leave the legislatures of the several States ample leeway to adjust their penalty schemes upward or downward if experience under such a regime yields unsatisfactory results.

Of course, as this Court held in *Solem v. Helm*, 463 U.S. 277 (1983), even punishment authorized by statute may be so disproportionate as to be constitutionally excessive. Under the criteria articulated in *Solem*, a court considering the excessiveness of a punishment including a punitive damage award should also examine whether a statutory punishment scheme is compatible with the punishment prescribed by that State and other States for similar offenses.

A number of courts have employed, as a means of determining the excessiveness of punitive damages as a matter of state law, the requirement that a punitive damage award must bear some loosely defined "reasonable relationship" to the compensatory damage award in a particular case. Although this test appears, superficially, to provide a convenient and simple means of controlling the size of punitive awards, the "reasonable relationship" test must be rejected for any one of several reasons. First, that test is ill-conceived as a matter of theory because the size of a compensatory damage award—which attempts to measure harm to the plaintiff—bears no necessary or log-

ical relationship to the level of punishment appropriate to secure society's interest in retribution and deterrence.

Second, the "reasonable relationship" test should be rejected because it cannot provide a rule of decision suitable for all, or even most, punitive damage cases. Its use as a state law rule has appropriately been abandoned in cases in which the compensatory damages have been very small notwithstanding the danger to society posed by the type of misconduct involved. Similarly, its use in cases, such as *Goodyear*, in which the conduct at issue was fully legal at the time it was "committed," but which led to severe injury to a plaintiff and a large compensatory damage award, would be equally absurd.

Third, the "reasonable relationship" test would in fact provide no meaningful control over the excessiveness of punitive damage awards because the sizes of compensatory damage awards themselves are within the almost absolute discretion of juries and are themselves subject to virtually no judicial supervision. Multiplication of such an uncertain, volatile number as a means of introducing fairness and certainty into the punitive damage system would be both nonsensical and inconsistent with the proper interpretation of the Excessive Fines Clause.

#### ARGUMENT

##### I

#### CONSTITUTIONAL EXCESSIVENESS UNDER THE EIGHTH AMENDMENT SHOULD BE MEASURED BY COMPARING THE PUNITIVE DAMAGE AWARD WITH THE PENALTY PRESCRIBED BY THE LEGISLATURE FOR THE SAME CONDUCT

If the Court decides that the Excessive Fines Clause of the Eighth Amendment applies to punitive damage awards, then the Court will presumably also fashion a standard by which constitutional excessiveness may be determined. Ascertaining constitutional excessiveness by comparing a par-

ticular punitive damage award to the maximum monetary fine established by the pertinent jurisdiction for engaging in the kind of conduct that gave rise to the award provides a principled, objective and practicable standard for measuring constitutional excessiveness.

#### A. Punitive Damage Awards Are Constitutionally Excessive If They Exceed Punishments Imposed by the Legislature for the Underlying Conduct

In *Solem v. Helm*, 463 U.S. 277 (1983), the Court recognized for the first time that the Cruel and Unusual Punishments Clause of the Eighth Amendment incorporated the concept of proportionality with respect to incarceration that was said to have been contained in the parallel provision of the English Bill of Rights of 1689. In reaching this conclusion, the *Solem* Court not only acknowledged, but also placed great reliance on, the historical role of the Excessive Fines Clause and its English and early American antecedents.

The Court's opinion began with the observation that, "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." 463 U.S., at 284. In support, the Court pointed to the fact that three chapters of Magna Carta—the direct historical antecedents of the Excessive Fines Clause—"were devoted to the rule that 'amerce-ments' may not be excessive," *id.*, noting that "[a]n amercement was similar to a modern-day fine," and that "[i]t was the most common criminal sanction in 13th-century England." *Id.*, at 284 n.8. According to the Court, "[t]hese were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments." *Id.*, at 285. The Court observed that the proportionality limitation was carried forward in a provision of the English Bill of Rights of 1689, which was later "adopted verbatim" in the Virginia Declaration of Rights



of 1776, which in turn was the direct basis for the Eighth Amendment. *See id.*, at 285 & n.10.

That excessive *fin*es, or amercements, were subject to these historical limitations was not the subject of dispute between the majority and the dissenters in *Solem*. Rather, the Court split over the *Solem* majority's conclusion that these historical limitations applied to incarceration as well as fines. According to the *Solem* majority: "When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional." 462 U.S., at 285. Thus, the majority held that the Eighth Amendment contains not only the right to be free from excessive fines, but also a more generalized "right to be free from excessive *punishments*." *Id.*, at 286 (emphasis added). It is not necessary for the Court to revisit the question upon which it split in *Solem* in order to decide the case at bar. Rather, all the Court must do is hold that which is explicitly assumed in *Solem*—that the Eighth Amendment places limits on the imposition of excessive punitive fines.

As the brief of Golden Rule Insurance Company, *et al.*, as *amici curiae* demonstrates, the Excessive Fines Clause of the Eighth Amendment and its antecedents in the Virginia Declaration of Rights, the English Bill of Rights, and Magna Carta should, consistently with practice under them, be applied to control the excessiveness of punitive damage awards. The history of these provisions, read in light of the decision in *Solem*, points to the appropriate standard for judging whether a punitive damage award is "excessive" under the Excessive Fines Clause: if a punitive damage award exceeds the maximum punishment imposed by the legislature for the underlying conduct, it is constitutionally excessive. This proposed standard, with the other standards articulated in *Solem*, would faithfully implement the language and evident purpose of the Excessive Fines Clause and would leave the legislatures substantial discretion to set appropriate limits on the availability of punitive

damages for all conduct deemed suitable for the infliction of punishment.

1. *The History of the Antecedents of the Excessive Fines Clause Supports the Reference to Existing Statutory Fines as a Basis for Determining Excessiveness of a Punitive Damage Award*

Under Magna Carta, pre-established limits on amercements—the antecedents of punitive damage awards—were established by custom, local rule or statute and were ascertained by the justices of the court before the jury or its ancient equivalent determined the actual amercement to be imposed. *See* J. Holt, *Magna Carta* 50, 230-231 (1965); W. McKechnie, *Magna Carta* 298 (2d ed. 1958); F. Thompson, *Magna Carta: Its Role In The Making of the English Constitution 1300-1629*, 361 (1948). In this way, the party to be amerced was given notice of the maximum penalty for a given offense and could be punished only up to that limit. Once it was determined that a person should be amerced, a group of peers of that person were charged with deciding whether the maximum available amercement or a lesser sum—or no amercement at all—should be assessed. *Br. of Golden Rule Insurance Company, et al.*, at 10-14. Thus, the "jury" brought its broad and literally merciful discretion to bear within pre-set limits.

Magna Carta worked a substantial reform of the previous state of affairs in which parties subject to amercement were literally at the mercy of the Crown, frequently resulting in arbitrary and excessively harsh punishment. This reform was carried forward in Article 10 of the English Declaration of Rights of 1689, and then enacted in the Bill of Rights of 1689, in language much like that adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 Wm. & Mary, sess. 2, ch. 2 (1689). The drafters of this provision "wanted to prohibit punishments that were unauthorized by statute." L. Schworer, *The Declaration of Rights, 1689*, 93-94 (1981).



The principle that fines could not be imposed without pre-existing statutory sanction was thus well-established by the time the Virginia Declaration of Rights of 1776 adopted verbatim the applicable provisions of the English Bill of Rights. And, as the Court observed in *Solem*, "[t]he Eighth Amendment was based directly on Art. I, § 9, of the Virginia Declaration of Rights (1776), authored by George Mason." 463 U.S., at 285 n.10. According to the Court: "Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments." *Id.*, at 286.

Although it is possible to disagree—as members of the Court did in *Solem*—about whether the protection provided by the English Bill of Rights included the right to be free from excessive incarceration, the historical evidence is overwhelming that the amercements clauses of Magna Carta and their counterpart in the English Bill of Rights—the Excessive Fines Clause—precluded the imposition of fines in the absence of, or in excess of, pre-existing limits. Thus, the historical basis for applying the proportionality requirement of the Excessive Fines Clause of the Eighth Amendment to punitive damage awards is much more substantial than was true of the Cruel and Unusual Punishments Clause involved in *Solem*.

The standard proposed by Goodyear is clearly derived from, if not mandated by, this historical evidence.<sup>1</sup> More-

<sup>1</sup> The only difference between the standard Goodyear proposes and the practice under Magna Carta is that the pre-established limits on amercements could be established by either custom, local rule or statute. It appears that over time, however, statutory rather than common law determination of those limits became the prevailing practice. See *Br. of Golden Rule Insurance Company, et al.*, at 10-16. Just as States may no longer constitutionally create common law crimes, cf. *Bowie v.*

over, it provides a principled and objective approach that would be convenient to administer. Under the proposed test, the question whether an award is constitutionally excessive generally can be resolved by determining whether the State in which the damages were awarded has established a statutory maximum fine for the conduct in question, and, if so, whether the award exceeds that maximum. If the State has not enacted a statutory maximum, then the award of *any* punitive damages is constitutionally "excessive." If the history of Magna Carta and the English Bill of Rights means anything, it means this much. Otherwise, the reforms introduced by those documents—fair notice to defendants of the extent of their punitive exposure and prevention of arbitrary and excessively harsh penalties—would be read out of the law.

Although many States may not presently have statutes prescribing the maximum punitive awards recoverable for various types of conduct,<sup>2</sup> the standard proposed leaves the States substantially free to adopt, or revise, statutes setting such maximum fines for any conduct it chooses. Thus, legislatures rather than juries would make the complex and often subjective judgments about the proper level of punishment for specific conduct. Not only are legisla-

*City of Columbia*, 378 U.S. 347 (1964), States should not be permitted to establish the required limits on punitive damages by means other than statute. Indeed, any other conclusion would be inconsistent with the principle that "views . . . regarding severity of punishment . . . are peculiarly questions of legislative policy." *Gore v. United States*, 357 U.S. 286, 393 (1958) (Frankfurter, J.).

<sup>2</sup> Ascertaining whether a State has enacted a statute setting forth the maximum fine for a particular type of conduct will require a comparison of the similarity between the conduct for which the State has established a maximum fine and the conduct underlying the award of punitive damages. The two probably need not be identical so long as the statute in question fulfills the function of the Excessive Fines Clause by giving fair notice of the maximum exposure and thereby precluding surprise.

tures required to perform this task under the Excessive Fines Clause, but they are also best suited to perform it.<sup>3</sup>

**B. By Analogy to *Solem v. Helm*, Punitive Damage Awards Within Statutory Limits May Also Be So Disproportionate as To Be Constitutionally Excessive.**

If the Court adopts the standard advanced in this brief, it need not decide in this case whether a punitive damage award within a pre-existing statutory limit could ever be considered "excessive" under the Excessive Fines Clause. Vermont has never legislatively authorized any punitive fine comparable in magnitude to the punitive damage award in this case. Nevertheless, the possibility that some

<sup>3</sup> It might be argued, in the case at bar and in other cases, that the application of this test would yield punishment that was not sufficiently harsh. For example, in *The Goodyear Tire & Rubber Co. v. Hodder*, No. 88-626, the application of this test would result in a financial penalty (in addition to complete compensation in the form of a compensatory damage award of \$3.4 million) of several thousand dollars. See *Petition for Cert. of Goodyear*, at 23. To argue that this penalty is too low, however, is to quarrel with Minnesota's legislature. That body is the most capable of making judgments on behalf of the citizens of Minnesota as to the level of fine necessary to fulfill the public's interest in retribution and deterrence where, for example, a defendant has engaged in deceptive practices in connection with the sale of merchandise. *Id.* Until such time as Minnesota's legislature (or Vermont's) acts to revise that judgment, it is the punitive damage award of \$4,000,000 imposed by Minnesota's judiciary, not the existing judgment of Minnesota's legislature, that must be regarded as constitutionally unacceptable.

Moreover, it must be remembered that the practical impact of the adoption of Goodyear's proposed test would not be to deny successful plaintiffs any recovery to which they are "entitled" in any constitutional sense. The plaintiff in the Goodyear case has already received \$3.4 million in full compensation for his injuries. And, it is universally accepted, as articulated by the Supreme Court of Minnesota, that "punitive damages do not 'belong' to the plaintiff in the same sense as compensatory damages." *Petition for Cert. App.* 20a, 426 N.W.2d, at 837.

States might authorize maximum fines of that magnitude in the future requires Goodyear to address that possibility.

A challenge to a punitive damage award within a pre-existing, ascertainable statutory maximum would require the Court—in the context of punitive fines and the Excessive Fines Clause—to examine an issue over which it split in *Solem*. That issue is whether a legislatively authorized punishment can be so disproportionate as to be constitutionally excessive, and therefore invalid, under the Eighth Amendment.

By analogy to *Solem v. Helm*, the Excessive Fines Clause should be held to require more of the States than simply the provision of fair notice of the maximum punishment that may be inflicted for particular conduct. That Clause requires that a punitive fine be proportional to the offense. Thus, under certain circumstances that Clause may have to be applied to strike down a punitive damage award that is within a statutorily prescribed maximum.

If, for example, a statute expressly authorized punitive fines of up to \$20,000,000 in all punitive damage cases without purporting to discriminate among the vastly different types of conduct that could be penalized under that "limit," the statute would not provide fair notice to persons potentially punishable under it. That statute would also almost assuredly violate the proportionality requirement of the Excessive Fines Clause under most circumstances because the \$20,000,000 potential punishment would undoubtedly be exponentially greater than other monetary punishments inflicted within any jurisdiction in this country, either civilly or criminally, for similar or indeed more heinous conduct.

By a parity of reasoning, a punitive damage award imposed pursuant to that statute might also violate the proportionality requirement of the Excessive Fines Clause if it were in excess of the maximum fines imposed within that jurisdiction for *similar* conduct. Reference to punish-



ments imposed for similar misconduct involves application of the second prong of the three-prong test articulated by the Court in *Solem v. Helm*. There, the Court recognized three bases upon which the constitutional proportionality of a sentence of incarceration might be judged:

(1) the harshness of the punishment relative to the gravity of the offense; (2) the relationship between the sentence imposed and sentences prescribed within the sentencing jurisdiction for similar offenses; and (3) the relationship between the sentence imposed and sentences prescribed for similar offenses in other jurisdictions.

463 U.S., at 292. The second prong of the *Solem* test is based upon the principle that by establishing maximum fines for specific types of misconduct, a legislature "implicitly state[s] its views on the size of monetary penalties it deem[s] sufficient to achieve both punishment and deterrence" with respect to similar offenses. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 283 n.13 (1984) (Powell, J., dissenting). Once a legislature has rendered such a judgment, the second prong of the *Solem* test requires that the legislature, within certain bounds, consistently apply that judgment to similar misconduct unless the legislature revises that judgment.

Although unlikely, it is possible that one or both of the other two prongs of the *Solem* test might come into play. Where, for example, a state legislature had authorized an enormous punitive damage award for conduct deemed in-offensive by virtually all other States, it is possible that the third prong of *Solem* might be invoked to find that punishment excessive.<sup>4</sup>

<sup>4</sup> The occasion to involve the third prong of the *Solem* test in this context would probably be rare. The application of *Solem*'s second prong would eliminate punishments that were disproportionate to other punishments imposed by that jurisdiction for similar conduct. Thus, the

In sum, Goodyear submits that a test of proportionality based upon reference to existing legislative judgments should be adopted by the Court as a means of applying the protections of the Excessive Fines Clause to defendants in punitive damage cases. This test is supported by history and precedent, and would go far to remedy the central evil of the punitive damage system—the empowering of juries to legislate and implement their own theories of retribution and deterrence on an *ad hoc* basis in every punitive damage case—without unduly restricting the power of the state legislatures to adjust their punitive systems to reflect the values of their constituents.<sup>5</sup>

## II

### THE RELATIONSHIP OR RATIO BETWEEN PUNITIVE AND COMPENSATORY DAMAGES PROVIDES NO PRINCIPLED BASIS FOR DETERMINING THE CONSTITUTIONAL EXCESSIVENESS OF PUNITIVE DAMAGE AWARDS

A number of lower courts have measured the excessiveness of punitive damage awards, as a matter of state law, by their proportionality to compensatory awards. However, whether a punitive damage award bears some

third prong would apparently come into play only in the unlikely event that a State's entire punishment structure was so extraordinarily severe that it created a very broad Eighth Amendment problem.

<sup>5</sup> In its petition, Browning-Ferris suggests the possibility that comparing the punitive damage award in its case to other punitive damage awards entered in totally dissimilar cases in Vermont might be a relevant criterion in determining constitutional excessiveness. That suggestion, however, implicitly assumes that juries may be regarded as competent to formulate and implement a rational system of punishment on an *ad hoc* basis under the rules presently applicable to these cases. Such an assumption might have some plausible basis if juries in Vermont punitive damage cases (or in other jurisdictions) operated within the constraints of legislatively fixed limits on punitive damage awards. That is, of course, not the case.



"reasonable relationship" to a compensatory damage verdict is not a constitutionally relevant consideration under the Eighth Amendment. Indeed, nothing in the history or logic of the proportionality requirement of the Excessive Fines Clause supports such a test. If adopted, it would lead to totally arbitrary results and would fail to advance the express purposes underlying the imposition of a punishment for the public-wrong component of an antisocial act.

**A. Neither the History of, nor the Logic Behind, the Excessive Fines Clause Supports a Test of Excessiveness Based upon the Relationship Between Compensatory and Punitive Damages**

Nothing in the history of the prohibition on excessive fines contained in the lineal antecedents of the Excessive Fines Clause suggests that those precursors were concerned with ensuring a "reasonable relationship" between the reparative and punitive components of the total award of damages.<sup>6</sup> See *Br. of Golden Rule Insurance Company, et al.*, at 16 & n.25. In fact, what the history of those provisions establishes is that punitive damages, in the form of amercements, were initially set by the English courts

<sup>6</sup> Indeed, the early English cases make clear that, to the extent that amercements must have been "reasonably related" or "proportionate" to any factor, it was to "the wrong done to the lord or the court, and not the other party to litigation . . . ." S. Milsom, *Legal Introduction to Nova Narrationes* in 80 *Selden Society cci* (E. Shanks ed.) (footnote omitted) (relying on A. Fitzherbert, *Natura Brevium* f. 75E (6th ed. 1718)). Fitzherbert made this point very strongly, stating that the

Amercement shall not be unto the Value of the Damages which is done unto the [wronged person], but having Regard unto the Wrong and Offense done unto the Lord for the Wrongs done unto his [wronged person].

A. Fitzherbert, *Natura Brevium*, 168 (f. 75), quoted in F. Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300-1629*, 45 (1948).

based upon the nature of the offense. As Volumes 3 and 4 of Blackstone's Commentaries make clear, antisocial conduct was perceived as either a private wrong or a public wrong. Where conduct contained elements of each, compensation reimbursed the private wrong while a fine or amercement redressed the public wrong. Thus the public injury, not the private injury, was the relevant standard for evaluating the amount of the punishment. Further, limits on the punishment were frequently derived in advance from local ordinances, statutes or custom, and, as so limited, sums were finally assessed in full or lowered by "juries" who were not even necessarily informed of the amount of damages, if any, awarded to the opposing litigant. See *Br. of Golden Rule Insurance Company, et al.*, at 10-11.

This history is but a reflection of the logic of, and justification for, the imposition of punitive awards in civil cases both pre-Magna Carta and today. Compensatory damages are assessed in order to make an aggrieved litigant whole—to restore a wronged person to the position he or she would have been in but for the wrong at issue. Punitive damages and amercements are and were imposed for a very completely different reason—to punish the wrongdoer for the injury done to the public by his misconduct and to deter him and others from future similar wrongdoing. The common law assumed such fines were desirable "on the ground that every evil deed inflicts a wrong on society in general, as well as upon its victim." W. McKechnie, *Magna Carta* 285 (2d ed. 1958). In short, punitive damages fulfill a punitive, public purpose bearing no necessary or logical relationship to the monetary measure of the injury that may have resulted from the private wrong.

The purposes and history of punitive damages thus suggest that their size should be based upon "the enormity of defendant's conduct and the amount necessary to deter defendant and others." Ellis, *Punitive Damages in Iowa*

*Law: A Critical Assessment*, 66 Iowa L. Rev. 1003, 1059 (1981) (hereinafter "Ellis, *Critical Assessment*"). Because particularly reprehensible acts may fortuitously result in negligible compensatory damages, requiring a relationship between punitive and compensatory awards may "thwart completely the purpose of punitive damages." Comment, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 Pac. L.J. 823, 840 (1978) (hereinafter "Comment, *Frustration of Purpose*"). In Professor Morris' classic example, "the grossly negligent hunter may shoot into a crowd of people and only break a ten-dollar pair of glasses." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1181 (1931). If the punitive damage award in such a case must be "reasonably proportioned" to the actual damages, then the hunter will be neither punished nor deterred. *Id.*

On the other hand, where the compensatory damages are large, "punitive damages in a large amount may be uncalled for, even though defendant's conduct was aggravated, since the size of the compensatory damage award may itself adequately serve the deterrence function, and 'sting' the defendant sufficiently to serve the retributive function." Ellis, *Critical Assessment*, 66 Iowa L. Rev., at 1060.<sup>7</sup> The "reasonable relationship" requirement thus "fails to carry out the punitive function of exemplary damages, since it stresses the harm which actually results rather than the social undesirability of the defendant's behavior." Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 531 (1957).

Perhaps because it attempts to mix apples and oranges, the "reasonable relationship" or "reasonably proportionate" requirement is not accepted by a substantial number

<sup>7</sup> See also Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev., at 1182.

of jurisdictions<sup>8</sup>, including Vermont<sup>9</sup>, and has been rejected by the majority of commentators who have addressed the subject.<sup>10</sup> The relationship requirement has been variously condemned as "unnecessary and ineffective;"<sup>11</sup> "artificial" and "meaningless;"<sup>12</sup> an "empty requirement;"<sup>13</sup> a "feeble attempt to provide a guideline;"<sup>14</sup> and "more often a rationalization of results than a means of obtaining them."<sup>15</sup>

That the "reasonable relationship" test is nothing more than a juridical artifice employed to explain the result reached in a particular case is amply demonstrated not only by the wide range of "relationships" sustained in differing jurisdictions purportedly applying that test,<sup>16</sup> but

<sup>8</sup> See, e.g., *Star Credit Corp. v. Ingram*, 75 Misc. 2d 299, 347 N.Y.S.2d 651 (1973); *D.C. Transit Systems, Inc. v. Brooks*, 264 Md. 578, 287 A.2d 251 (1972); *U-Haul Co. of Alabama v. Long*, 382 So. 2d 545 (Ala. 1980); *Lassitter v. International Union of Operating Engineers*, 349 So. 2d 622 (Fla. 1976); *Leimgruber v. Claridge Associates, Ltd.*, 73 N.J. 450, 375 A.2d 652, 656 (1977). See generally, Annot., 40 A.L.R. 4th 11, § 15 (1985).

<sup>9</sup> See *Pezzano v. Bonneau*, 133 Vt. 88, 329 A.2d 659, 661 (1974).

<sup>10</sup> See, e.g., Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1, 58-60 (1982); Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 666-67 (1980); Comment, *Frustration of Purpose*, 9 Pac. L.J. 823 (1978); Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev., at 1180; Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517 (1957).

<sup>11</sup> Comment, *Frustration of Purpose*, 9 Pac. L.J., at 823, 825.

<sup>12</sup> Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J., at 639.

<sup>13</sup> K. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* § 1800, at 21 (1985).

<sup>14</sup> Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 Drake L. Rev. 195, 219 (1977-78).

<sup>15</sup> Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev., at 1180. Accord, Prosser & Keeton, *The Law of Torts* § 2, at 15 (5th ed. 1984).

<sup>16</sup> Compare *Auburn Harpswell Assoc. v. Day*, 438 A.2d 234 (Me. 1981)



also by the conflicting results yielded by that test within various jurisdictions.

For example, in Colorado, punitive awards for assault and battery that were ten and thirty-six times greater than actual damages have been upheld,<sup>17</sup> whereas a 4:1 ratio in another assault case has been found excessive.<sup>18</sup> In Kansas, awards bearing punitive-to-compensatory ratios of 30:1, 24:1, and 11:1 have been upheld,<sup>19</sup> while a 6:1 ratio has been found excessive.<sup>20</sup> Similarly, in Texas, punitive-to-compensatory ratios of 40:1, 19:1, 14:1, and 8.6:1 have been sustained,<sup>21</sup> while a 8.6:1 ratio has been found ex-

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(60:1 not excessive) with *Malcolm v. Little*, 295 A.2d 711, 714 (Del. 1972) ("The judicial conscience of this Court is shocked by the disproportionate award of punitive damages of \$6,000 as against the compensatory damage award of \$3,000."). See also *Morris*, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev., at 1180 (and cases cited therein) ("Judgments in which punitive damage verdicts have hardly exceeded the actual damages have been reversed as excessive and judgments allowing punitive damages many times as great as the actual damages have been affirmed.").

<sup>17</sup> *Mailloux v. Bradley*, 643 P.2d 797 (Colo. App. 1982).

<sup>18</sup> *Kresse v. Bennett*, 151 Colo. 549, 379 P.2d 807 (1963). See also *Ailey v. Gubser Development Co.*, 569 F. Supp. 36, 40 (D. Colo. 1983), *rev'd on other grounds*, 785 F.2d 849 (10th Cir.), *cert. denied*, 107 S. Ct. 457 (1986). (applying Colorado law) (10:1 ratio is so disproportionate as to shock the judicial conscience).

<sup>19</sup> *Sampson v. Hunt*, 233 Kan. 572, 665 P.2d 743 (1983); *Ettus v. Orkin Exterminating Co.*, 233 Kan. 555, 665 P.2d 730 (1983); *Binyon v. Nesselth*, 231 Kan. 381, 646 P.2d 1043 (1982).

<sup>20</sup> *Slough v. J.I. Case Co.*, 8 Kan. App. 2d 104, 650 P.2d 729 (1982). See also *Dearmore v. Gold*, 400 F.2d 887, 888 (10th Cir. 1968) (apparently applying Kansas law) (11:1 ratio is "so extremely disproportionate that we must assume that the jury acted either with passion or prejudice.").

<sup>21</sup> *Tynberg v. Cohen*, 32 S.W. 157 (Tex. Civ. App. 1895, writ ref'd); *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981); *Carr v. Galvan*, 650 S.W.2d 864 (Tex. Civ. App. 1983) (writ ref'd n.r.e.); *Parker v. McGinnes*, 594 S.W.2d 550 (Tex. Civ. App. 1980).

cessive.<sup>22</sup> And in Iowa, awards with punitive-to-compensatory ratios of 12.5:1, 7:1, and 6.5:1 have been upheld,<sup>23</sup> while ratios of 1.9:1, 1.6:1, and 1:1 have been found excessive.<sup>24</sup>

The unworkability of the rule is further demonstrated by its necessary abdication by courts where compensatory damages are small, nominal or nonexistent.<sup>25</sup> These self-evident discrepancies have led the Iowa Supreme Court to concede:

Precedent is of little value here and the [reasonable relationship] standard by which the award is to be measured is so indefinite that it offers small help.

*McCarthy v. J.P. Cullen & Son Corp.*, 199 N.W.2d 362, 369 (Iowa 1972).<sup>26</sup>

In short, both the arbitrary and anomalous results produced by its purported application and the irreconcilability of the reasonable relationship rule with the stated purposes of punitive damages amply demonstrate the error in embracing such a rule of law for determining constitutional

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<sup>22</sup> *Ward v. Shriro Corp.*, 579 S.W.2d 257 (Tex. Civ. App. 1978).

<sup>23</sup> *International Harvester Co. v. Iowa Hardware Co.*, 146 Iowa 172, 122 N.W. 951 (1909); *Tyler v. Bowen*, 124 Iowa 452, 100 N.W. 505 (1904); *Union Mill Co. v. Prenzler*, 100 Iowa 540, 69 N.W. 876 (1897);

<sup>24</sup> *Sergeant v. Watson Bros. Transp. Co.*, 244 Iowa 185, 52 N.W.2d 86 (1952); *Crum v. Walker*, 241 Iowa 1173, 44 N.W.2d 701 (1950); *Hartman v. Peterson*, 246 Iowa 41, 66 N.W.2d 849 (1954).

<sup>25</sup> See, e.g., *Robison v. Lescrenier*, 721 F.2d 1101, 1113 (7th Cir. 1983) (applying Wisconsin law) (\$10,000 punitive damages; 6 cents compensatory damages); *Alessio v. Hamilton Auto Body, Inc.*, 21 Ohio App. 3d 247, 486 N.E.2d 1224 (1985) (\$30,000 punitive damages; \$1 compensatory damages).

<sup>26</sup> See also *Riley*, *Punitive Damages: The Doctrine of Just Enrichment*, 27 Drake L. Rev., at 216-18.



excessiveness. As discussed in the next section of this brief, there is also another fundamental flaw in the reasonable relationship test that requires its rejection.

**B. A Constitutional Rule Limiting Punitive Damage Awards to a Multiple of Compensatory Damage Awards Would Not Curb the Excessiveness of Punitive Damages in an Effective or Principled Manner**

A rationale that might be advanced in support of the "reasonable relationship" test would be that, even if that test does not necessarily reflect society's interest in retribution and deterrence in particular cases, it nevertheless might produce constitutionally "acceptable" results because awards of compensatory damages are themselves subject to some limiting principle. Therefore, limiting punitive damages to amounts tied to compensatory damages would at least produce, in the main, rational and uniform results.<sup>27</sup> That assumption is, however, contrary to centuries of practice under which juries have been given virtually unfettered discretion with respect to the appropriate

<sup>27</sup> Justice O'Connor's concurrence in *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1655 (1988), suggested that the unpredictability and windfall nature of punitive damage awards was inconsistent with the dictates of due process. As Goodyear demonstrates below, the unpredictability of a jury's compensatory award is substantially tolerated under our system of law. Every time a jury assesses the appropriate amount of damages, for example, for mental anguish, emotional distress, or pain and suffering, the courts are loathe to interfere with that determination. See *Washington Gas Light Co. v. Landsden*, 172 U.S. 534, 555 (1899) ("[W]here . . . compensatory damages may be based upon the injury to the feelings and good name of a plaintiff . . . [the amount of] compensatory damages rests . . . largely in the discretion of a jury."). Permitting punitive awards that bear some relation to actual injury as measured by the jury's award of compensatory damages would thus provide neither additional protection nor predictability to defendants potentially subject to punitive damage awards.

amount of compensatory damages required to make a plaintiff whole. The multiple of a number which is itself within the almost unfettered discretion of a jury cannot possibly be relied upon as a benchmark for implementing the Eighth Amendment's requirement of proportionality.

*1. Courts Have Long Been Reluctant To Interfere With a Jury's Award of Compensatory Damages*

It is a fundamental principle of English and American jurisprudence that questions of law are for the court, and questions of fact are for the jury. The amount of damages, under our common-law system, has long been recognized as a "fact" to be found by the jury.<sup>28</sup> Accordingly, courts are, and have traditionally been, extremely reluctant to interfere with a jury's assessment of damages.<sup>29</sup>

The enormous discretion currently afforded juries in the awarding of damages is firmly rooted in English legal tradition.<sup>30</sup> Juries under early English common law were composed of local citizens called together to determine, by their own testimony, the merits of a neighborhood quarrel. The familiarity of jurors with the matters in dispute led courts to defer to that intimacy and to decline to review the amount of damages determined by the jurors to be appropriate.<sup>31</sup> Under that early system, the jury exercised virtually "unlimited control over the subject of remuneration." 4 T. Sedgwick, *Damages* § 1316, at 2656 (9th ed. 1912).<sup>32</sup>

<sup>28</sup> See *Tathwell v. City of Cedar Rapids*, 122 Iowa 50, 97 N.W. 96, 96 (1903).

<sup>29</sup> 4 T. Sedgwick, *Damages* §§ 1316-1319 at 2658-60 ("[O]n mere questions of fact the court always interferes with great hesitation and reluctance.").

<sup>30</sup> K. Redden, *Punitive Damages* § 2.2(A)(2), at 26 (1980).

<sup>31</sup> K. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* § 1.02, at 3.

<sup>32</sup> See also 1 T. Sedgwick, *Damages* § 349, at 688.

As time went by, jurors became further removed from personal knowledge of the facts. Yet the English courts retained much of their early reluctance to interfere with a jury's determination of the damages. Thus, in *Townsend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994, 994-95 (1677), "an outrageous verdict of 4,000 for scandalizing a politician was held to be beyond the court's touching, 'since by the law the jury are the judges of the damages.'"<sup>33</sup> So too, in *Wilmot v. Berkley*, Trin. 31 & 32, G.2, B.R., where the jury gave 500 in damages for "criminal conversation," the court refused to grant a new trial motion based upon excessive damages, "because in cases of tort the jury are the only proper judges of the damages."<sup>34</sup> Even as late as the time of Lord Mansfield, counsel was able to state the law to be that:

The Court cannot measure the ground on which the jury find damages that may be thought large . . . . [B]oth parties put themselves upon the jury to abide by their decision, as to the quantity of damages, as well as whether any or not.

*Gilbert v. Berkinshaw*, Lofft, 771, 98 Eng. Rep. 911, 911 (1773).

To be sure, by the end of the Eighteenth Century courts exercised increasing control over the measure of damages in contract actions and tort actions involving injury to property, situations in which fixed rules of compensation

<sup>33</sup> C. McCormick, *Handbook on the Law of Damages* § 6 at 26-27 (1935) (quoting *Townsend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994, 994-95 (1677)). See also *Russell v. Palmer*, 2 Wils. K.B. 325, 95 Eng. Rep. 837 (1767) (In an action against an attorney for negligence, the jurors were told they might find what damages they pleased.); *Beardmore v. Carrington*, 2 Wils. K.B. 244, 95 Eng. Rep. 790 (1764). See generally 1 T. Sedgwick, *Damages* § 349, at 688.

<sup>34</sup> *Beardmore v. Carrington*, 2 Wils. K.B. 244, 95 Eng. Rep. 790, 793 (1764) (explaining the holding of *Wilmot v. Berkley*, Trin 31 & 32 G.2, B.R.).

had begun to emerge.<sup>35</sup> However, "where personal suffering or outraged feelings complicated the estimate of damages, the court still held itself incompetent to review the verdict of the jury." 1 T. Sedgwick, *Measure of Damages* § 349, at 689.

Directly pertinent to this case, it has been persuasively established that the entire class of English cases establishing the doctrine of "exemplary" damages and authorizing juries to return awards far beyond any concept of just compensation for wrong suffered originated with the courts' reluctance to adjust, tamper with, or set aside a jury's monetary award.<sup>36</sup> For example, in the seminal case of *Huckle v. Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763), the court's unwillingness to overturn an award believed to be fifteen times greater than the amount of damages was sustained by Lord Chief Justice Camden's assumption that he had little, if any, authority to second guess the jury verdict:

Upon the whole, I am of the opinion the damages are not excessive; and that it is *very dangerous for the Judges to intermeddle in damages for torts*; it must be a glaring case instead of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages.

*Id.*, at 768-69 (emphasis added).<sup>37</sup>

Early American courts were quick to mirror their English counterparts' reluctance to interfere with a jury's ver-

<sup>35</sup> See 1 T. Sedgwick, *Damages* § 349, at 688-89; W. Hale, *Handbook on the Law of Damages* § 6, at 27 (2d ed. 1912).

<sup>36</sup> See 1 T. Sedgwick, *Damages* §§ 349-50, at 689-90; W. Hale, *Damages* §§ 87-88, at 302; Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev., at 518-19.

<sup>37</sup> See also *Beardmore v. Carrington*, 2 Wils. K.B. 244, 95 Eng. Rep. 790 (1764); *Townsend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994 (1677).



dict of *compensatory* damages.<sup>38</sup> Part of this reluctance stemmed from the gradual expansion of the concept of actual damages to include compensation for intangible injuries, such as mental anguish and pain and suffering. These intangibles made it difficult for a court to apply objective standards of review to compensatory damage awards—for what is an excessive amount for damaged feelings or great pain? These were and are determinations left to the jury under our system of law. And so the rule evolved in early American courts that broad discretion would be given a jury's determination of compensatory damages, particularly where nonpecuniary injuries were involved.<sup>39</sup> The most frequently quoted and paraphrased standard adopted by the courts for determining when a reviewing court could tamper with or set aside a jury's compensatory award was propounded by Chancellor Kent in an 1812 libel case:

The damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, as such as manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption. In short, the damages must be flagrantly

<sup>38</sup> See, e.g., *Whipple v. Cumberland Mfg. Co.*, 2 Story, 661, Fed. Cas. No. 17,516 (1843) (per Story, J.); *Thurston v. Martin*, 5 Mason 497, Fed. Cas. No. 14,018 (1830) (per Story, J.); *Berry v. Vreeland*, 21 N.J.L. 183, 187 (1847); *Harris v. Zanone*, 93 Cal. 59, 28 P. 845, 848 (1892); *Worster v. Proprietors of Canal Bridge Co.*, 16 Pick. (Mass.) 541, quoted in *W. Hale, Damages* §§ 96-97, at 342-44. ("In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the court, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case.")

<sup>39</sup> See, e.g., *Payne v. The Pacific Mail Steamship Co.*, 1 Cal. 32 (1850); *Warren v. Cole*, 15 Mich. 265 (1867); *McLean v. City of Lewiston*, 8 Idaho 472, 69 P. 478 (1902).

outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess.

*Coleman v. Southwick*, 9 Johns. (N.Y.) 45, 6 Am. Dec. 253 (1812).<sup>40</sup>

This historical reluctance to interfere with a jury's award of compensatory damages has persisted to this day. As documented in the Appendix, *infra*, virtually every trial and appellate court<sup>41</sup> in every state and federal circuit in the United States adheres to a substantially similar—if not identical—standard of review of a jury's compensatory award where damages are even arguably uncertain<sup>42</sup>.

In Minnesota, where the *Goodyear* jury sat, the test to be applied to warrant the Minnesota courts' substitution of their judgment for the jury's is whether the jury award of damages is "so inadequate or excessive that \* \* \* it could only have been rendered on account of passion or

<sup>40</sup> See also C. McCormick, *Handbook on the Law of Damages* § 18, at 71-72 (1935).

<sup>41</sup> Trial court review of a jury's compensatory damage award is limited to the granting of a new trial for excessive damages or the use of remittur or additur. Appellate review of the jury's award generally takes two forms: (1) review of the trial judge's failure to grant a new trial for excessive damages under an abuse of discretion standard; or (2) review of the excessiveness of damages as a matter of law.

<sup>42</sup> As demonstrated by the Appendix, virtually every state and every circuit has grafted some, if not all, of Chancellor Kent's terminology into their standard of review of compensatory damage awards. In West Virginia, for example:

[A]n appellate court will not set aside a jury verdict upon the claims that it is excessive, "unless the verdict is monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and such as manifestly shows jury passion, partiality, prejudice, or corruption."

*Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791, 800 (W. Va. 1986) (citations omitted).



prejudice." *Flanagan v. Lindberg*, 404 N.W.2d 799, 800 (Minn. 1987). The Minnesota courts "will not interfere with the jury's award of damages unless its failure to do so would be shocking or would result in plain injustice." *Hughes v. Sinclair Marketing, Inc.*, 389 N.W.2d 194, 199 (Minn. 1986).

On the occasions that this Court has been called upon to review damage awards in federal cases, it too has been extraordinarily deferential to compensatory awards entered by juries. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 394 U.S. 100, 123 (1969); *Grunenthal v. Long Island R.R.*, 393 U.S. 156, 160 (1968). The Court has, for example, repeatedly held in antitrust cases that a jury need only make a "just and reasonable estimate" of the amount of damages for the verdict to stand. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). See also *Story Parchment Co. v. Peterson Parchment Paper Co.*, 282 U.S. 555, 565-66 (1931) ("The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done.")

Thus, it remains as true today as it was 200 years ago that only in the clearest cases—and only then with "the greatest caution and reluctance"—will a court interfere with a jury's assessment of compensatory damages. W. Hale, *Handbook on The Law of Damages* §§ 96-97, at 342 (2d ed. 1912).

2. *Given the Great Deference Paid to Compensatory Damage Awards by the Courts, It Would Be Fundamentally Unfair and Irrational To Permit the Constitutional Excessiveness of Punitive Damage Awards To Be Determined by a "Multiple" of the Compensatory Award in a Particular Case*

The foregoing history of the judicial system's extreme reluctance to supervise and interfere with compensatory damage awards demonstrates the fundamental unfairness and irrationality of denying the constitutional protection of the Excessive Fines Clause to a defendant on the

grounds that the punitive damage award against it bears some specified or unspecified ratio to the compensatory damage award in the same case. Reliance on such a standard would, if employed uniformly, undoubtedly result in the affirmance of punitive damage awards totally disproportionate to the harm to society and totally unrelated to fulfilling the goal of deterrence. To hold that such punishment is constitutionally permissible if it is "X times" or "reasonably related to" an essentially unreviewable amount (the compensatory damage award) would be to inject additional uncertainty and unfairness into an already irrational, subjective process by which juries select, and courts review, the size of punitive damage awards.

For example, under Vermont law, a court will not interfere with a jury's award of compensatory damages unless "it [is] so small or large that it plainly indicates the award was the product of prejudice or other misguidance which undermines its validity as a verdict." *Larmay v. Van Etten*, 129 Vt. 368, 278 A.2d 736, 740 (1971). Under this standard, the *Browning-Ferris* jury presumably could have returned, without court interference, a compensatory award on the state tort claim much greater than the \$51,000 actually awarded. Accordingly, any standard that would condition, even tangentially, the defendant's punishment on the wide range of permissible verdicts would appear to be arbitrary and inconsistent with the dictates of due process. See *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1656 (1988) (O'Connor, J., concurring).

3. *Use of a Fixed Ratio To Determine the Constitutional Excessiveness of a Punitive Award Is Similarly Inappropriate*

Inasmuch as double and treble damages have a "historical pedigree" in statutory punitive actions,<sup>43</sup> it has oc-

<sup>43</sup> For example, Congress has authorized the trebling of actual damages as a measure of additional damages in antitrust cases. Section 4

casionaly been proposed that a fixed ratio of two- or three-to-one of punitive to compensatory damages might be an appropriate common law standard for determining the excessiveness of a punitive award. See *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 331 (5th Cir. 1981) (applying Texas law). Virtually every court that has addressed this proposition, albeit not in the constitutional context, has rejected the application of a "fixed ratio" rule.<sup>44</sup> The "refusal to specify a [mathematical] ratio is due to the need to individualize punitive damage verdicts." *Campus Sweater and Sportswear Co. v. M.B. Kahn Construction Co.*, 515 F. Supp 64, 106 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981). Moreover, to the extent that the reasonable relationship rule has been criticized for its ambiguities and anomalies, a fixed ratio rule would be subject to the same objections, because, if followed, it would produce equally

of the Clayton Act. 15 U.S.C. § 15. But, as the cases of this Court clearly show, Congress authorized antitrust treble damages to serve a number of purposes, only one of which is penal. See *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 314 (1978) ("The Court has noted that Section 4 has two purposes: to deter violators and deprive them of 'the fruits of their illegalities,' and 'to compensate victims of antitrust violations for their injuries.'") (citations omitted); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 485 (1977) ("Section 4... is in essence a remedial provision."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging private challenges to antitrust violations.") (emphasis in original); *American Society of Mechanical Engineers Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575-76 (1982) ("Treble damages 'make the remedy meaningful by counter-balancing the difficulty of maintaining a private suit' under the antitrust laws.") (citations omitted). Thus, treble damages under the antitrust laws serve quite different, more expansive purposes than punitive damages. Accordingly, the treble damage model is essentially irrelevant to the issues under consideration in this case, except to the extent that any portion of a treble damage award would have to be viewed as purely punitive.

<sup>44</sup> See e.g., *Torres v. North American Van Lines, Inc.*, 135 Ariz. 35, 658 P.2d 835, 840 (Ariz. App. 1982); *Miller v. Carnation Co.*, 39 Colo. App. 1, 564 P.2d 127, 131 (1977); K. Ghiardi & J. Kircher, *Punitive Damages*, *supra*, § 18.05.

unusual results. See, e.g., *Taylor v. Sandoval*, 442 F. Supp. 491 (D. Colo. 1977) (applying Colorado law) (jury award of \$4,000 punitive and \$1 compensatory damages reduced by trial court to \$5 punitives to maintain a reasonable relation).

More fundamentally, even if a fixed ratio rule were workable in practice, nothing in the text, history or structure of the Excessive Fines Clause provides any basis for determining constitutional excessiveness by reference to any such ratio. In any event, it is not at all evident how the Court would be able to arrive at any particular ratio by which to limit punitive awards. While the Excessive Fines Clause clearly demands proportionality, it does not set forth such a fixed ratio itself.

In short, the extraordinary repercussions of punitive damages to defendants and our economy, together with the Eighth Amendment, demand that courts exercise objective and principled control over their imposition and assessment. Although a reasonable relationship rule may have some superficial appeal, it should be candidly recognized that it would offer little guidance to the reviewing courts, would not advance in any rational way the purposes and functions of punitive damages, would not provide any meaningful protection to defendants facing punitive damage awards, and would be inconsistent with the history and meaning of the Eighth Amendment.

## CONCLUSION

This brief does not suggest that any particular theory of punishment, retribution or deterrence be written into the Constitution. It simply asks that the prohibition of excessive government fines contained in the Excessive Fines Clause be applied to constrain the discretion of juries and judges to impose punishments that are disproportion-



ate to society's legislatively expressed judgment as to the consequences for specified conduct.

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## APPENDIX



## APPENDIX

APPELLATE SCOPE OF REVIEW OF JURY  
AWARDS OF COMPENSATORY DAMAGES IN THE  
FIFTY STATES AND THIRTEEN FEDERAL CIRCUITS

## ALABAMA

*Trimble v. Todd*, 510 So. 2d 810, 813 (Ala. 1987) ("The amount of damages awarded is left to the discretion of the jury under proper instructions, and its decision will generally not be overturned unless the amount is so excessive as to show passion, bias, prejudice, or other improper motive, or is against the great weight and preponderance of the evidence.")

## ALASKA

*Fruit v. Schreiner*, 502 P.2d 133, 145 (Alaska 1972) (" '[W]e shall not set aside an award on a claim of excessiveness unless it is so large as to strike us that it is manifestly unjust, such as being the result of passion or prejudice or a disregard of the evidence or rules of law.' ")

## ARIZONA

*Starkins v. Bateman*, 150 Ariz. 537, 724 P.2d 1206, 1217-18 (Ariz. Ct. App. 1986) ("The amount of a damage award is a question peculiarly within the province of the jury, and it will not be overturned or tampered with unless the verdict was the result of passion and prejudice. . . . Where the trial judge has otherwise refused to interfere with the jury's verdict, this court will not interpose its own judgment unless convinced that the amount is so outrageously excessive to suggest, at first blush, passion or prejudice.")

## ARKANSAS

*AAA T.V. & Stereo Rentals, Inc. v. Crawley*, 284 Ark. 83, 679 S.W.2d 190, 191 (1984) ("Under our cases the [jury's assessment of damages] will ordinarily not be disturbed on appeal unless clearly the result of passion or prejudice, or so great as to shock the conscience of the court.")

## CALIFORNIA

*Greenfield v. Spectrum Investment Corp.*, 219 Cal. Rptr. 805, 174 Cal. App. 3d 111, 123 (2d Dist. 1985) (" 'In reviewing the amount of [compensatory] damages, we determine every conflict in favor of the prevailing party who is entitled to the benefit of every inference. We do not interfere with an award unless the verdict is so large it suggests passion, prejudice or corruption on the part of the jury.' ")

## COLORADO

*Smith v. Hoyer*, 697 P.2d 761, 765 (Colo. App. 1984) ("The amount of damages is within the sole province of the jury, and an award will not be disturbed unless it is completely unsupported by the record.")

## CONNECTICUT

*Herb v. Kerr*, 190 Conn. 136, 459 A.2d 521, 523 (1983) ("The assessment of damages is peculiarly within the province of the trier and the award will be sustained so long as it does not shock the sense of justice. The test is whether the amount of damages awarded falls within the necessarily uncertain limits of fair and just damages.")

## DELAWARE

*Delmarva Power & Light v. Stout*, 380 A.2d 1365, 1368 (Del. 1977) ("The Court will not set aside a

verdict unless it is so grossly excessive as to shock the Court's conscience and sense of justice, and unless the injustice is clear.")

## FLORIDA

*Odoms v. Travelers Ins. Co.*, 339 So. 2d 196, 198 (Fla. 1976) ("[A] verdict should not be disturbed on the ground of excessiveness unless it is manifestly so excessive as to shock the judicial conscience, or unless it is so excessive as to be indicative of prejudice, passion or corruption on the part of the jury, or unless it clearly appears that the jury ignored the evidence or misconceived the merits . . .")

## GEORGIA

*Cullen v. Timm*, 184 Ga. App. 80, 360 S.E.2d 745, 748 (1987) ("Even though the evidence is such as to authorize a greater or lesser award than that actually made, the appellate court will not disturb it unless it is so flagrant as to 'shock the conscience.' ")

## HAWAII

*Quedding v. Arisumi Bros., Inc.*, 66 Haw. 335, 661 P.2d 706, 709 (1983) ("In reviewing a jury's award of damages when a claim of excessiveness is pressed upon us for decision, we are bound by the general rule that a finding of an amount of damages is so much within the exclusive province of the jury that it will not be disturbed on appellate review unless palpably not supported by the evidence, or so excessive and outrageous when considered with the circumstances of the case as to demonstrate that the jury in assessing damages acted against rules of law or suffered their passions or prejudices to mislead them.")

**IDAHO**

*Barlow v. International Harvester Co.*, 95 Idaho 881, 522 P.2d 1102, 1119 (1974) ("The power of this court over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury.'")

**ILLINOIS**

*King v. American Food Equipment Co.*, 160 Ill. App. 3d 898, 513 N.E.2d 958, 969 (Ill. App. 1987) ("The test for an excessive verdict is whether it falls within the necessarily flexible limits of fair and reasonable compensation or is so large as to shock the judicial conscience.")

**INDIANA**

*Groves v. First National Bank of Valparaiso*, 518 N.E.2d 819, 831 (Ind. App. 1988) ("Where the damage award is so outrageous as to indicate the jury was motivated by passion, prejudice, partiality, or the consideration of improper evidence, we will find the award excessive.")

**IOWA**

*Harsha v. State Savings Bank*, 346 N.W.2d 791, 799 (Iowa 1984) ("[W]e do not disturb jury verdicts pertaining to damages unless they are flagrantly excessive or inadequate, so out of reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support.")

**KANSAS**

*Ratterree v. Bartlett*, 238 Kan. 11, 707 P.2d 1063, 1072 (1985) ("Where a charge of excessive verdict

is based on passion or prejudice of the jury, but is supported solely by the size of the verdict the trial court will not be reversed for not ordering a new trial, and no remittitur will be ordered unless the amount of the verdict in light of the evidence shocks the conscience of the appellate court.'")

**KENTUCKY**

*Davis v. Graviss*, 672 S.W.2d 928, 933 (Ky. 1984) ("In short, the rules governing appellate practice do not direct the appellate judge to decide if the verdict shocks his conscience or causes him to blush. Those rules charge us with the responsibility to review the record and decide whether, when viewed from a standpoint 'most favorable' to the prevailing party, there is evidence to support the verdict and judgment.")

**LOUISIANA**

*Scott v. Hospital Service Dist. No. 1 of St. Charles Parish*, 496 So. 2d 270, 274 n.11 (La. 1986) ("A determination of the measure of damages will not be disturbed on appeal unless the trier of fact abused its much discretion [sic] in making the award . . . .")

**MAINE**

*Braley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359, 361 (Me. 1982) ("We must uphold the [jury's assessment of damages] unless it has no rational basis in the record or the jury acted under some bias, prejudice, or improper influence, or reached its verdict by compromise.")

**MARYLAND**

*Ory v. Libersky*, 40 Md. App. 151, 389 A.2d 922, 931 (1978) ("In the absence of prejudicial error in



the trial court's instructions, the amounts of the verdicts are not reviewable on appeal.")

## MASSACHUSETTS

*Homsi v. C.H. Babb Co.*, 409 N.E.2d 219, 222 (Mass. App. Ct. 1980) (" '[A]n award of damages must stand unless . . . to permit it to stand was an abuse of discretion on the part of the court below, . . . amounting to an error of law.' ")

## MICHIGAN

*Jenkins v. Southeastern Michigan Chapter, American Red Cross*, 141 Mich. App. 785, 369 N.W.2d 223, 230 (Mich. App. 1985) ("A reviewing court will substitute its judgment for that of the jury only where the verdict has been secured by improper methods, prejudice or sympathy, or where it is so excessive as to 'shock the judicial conscience.' . . . Where a verdict is within the range of evidence produced at trial, this Court will not reverse it as excessive and against the great weight of evidence.")

## MINNESOTA

*Flanagan v. Lindberg*, 404 N.W.2d 799, 800 (Minn. 1987) ("The test to be applied by an appellate court is whether the jury award of damages is 'so inadequate or excessive that \*\*\* it could only have been rendered on account of passion or prejudice.' ")

## MISSISSIPPI

*City of Jackson v. Locklar*, 431 So. 2d 475, 481 (Miss. 1983) ("We will not vacate or reduce a damage award unless it is so out of line as to shock the conscience of the Court.")

## MISSOURI

*Fort Zumwalt School District v. Recklein*, 708 S.W.2d 754, 756, (Mo. App. 1986) ("Appellate courts will not disturb a jury's assessment of damages 'unless the amount is so grossly excessive that it shocks the conscience of the court.' ")

## MONTANA

*Giles v. Flint Valley Forest Products*, 179 Mont. 382, 538 P.2d 535, 540 (1979) ("The rule is that given we have a justice system which confides to juries the duty to determine the issues and to fix the amount of compensation to be paid, unless the award is such to shock the conscience and understanding, it must be accepted as conclusive.")

## NEBRASKA

*Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56, 78 (1987) ("A verdict will not be set aside on appeal unless it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the trier of fact disregarded the evidence or rules of law.")

## NEVADA

*Miller v. Schnitzer*, 78 Nev. 301, 371 P.2d 824, 828-29 (1962) ("The extent of such damage, by its very nature, falls peculiarly within the province of the trier of fact, in this case, a jury. . . . The core of the matter seems to be that an appellate court will disallow or reduce the award if its judicial conscience is shocked; otherwise it will not.")

## NEW HAMPSHIRE

*Gelinas v. Mackey*, 123 N.H. 690, 465 A.2d 498, 500 (1983) ("This court will not set aside a verdict

as excessive unless it appears that no reasonable person could have made such an award.")

## NEW JERSEY

*Baxter v. Fairmont Food Co.*, 74 N.J. 588, 379 A.2d 225, 229-30 (1977) ("The judgment of the initial fact-finder . . . is entitled to very considerable respect. It should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination . . . that the continued viability of the judgment would constitute a manifest denial of justice.")

## NEW MEXICO

*Ranchers Exploration and Development Corp. v. Miles*, 102 N.M. 387, 696 P.2d 475, 478 (1985) ("On appeal, a jury award will not be set aside as excessive unless the award is not supported by substantial evidence, or the jury was swayed by passion or prejudice, or employed an incorrect measure of damages.")

## NEW YORK

*Ostrowski v. Apex Marine Corp.*, 123 A.D.2d 257, 506 N.Y.S.2d 164, 166 (N.Y.A.D. 1 Dept. 1986) ("To warrant interference with a jury's assessment of damages, the excessiveness or inadequacy of the award must be such as to shock the conscience of the court.")

## NORTH CAROLINA

*Mattox v. Huneycutt*, 3 N.C. App. 63, 164 S.E.2d 28, 29 (1968) ("This court will not substitute its judgment for that of the triers of the facts.")

## NORTH DAKOTA

*Eriksen v. Boyer*, 225 N.W.2d 66, 75 (N.D. 1974) ("Before we find a verdict excessive, we must find that the amount awarded is so unreasonable and extreme as to indicate passion and prejudice on the part of the jury.")

## OHIO

*Carter v. Simpson*, 16 Ohio App. 3d 420, 476 N.E.2d 705, 709 (1984) ("The jury's determination of damages should not be set aside unless the damages awarded were so excessive as to appear to have been awarded as a result of passion or prejudice, or unless the amount is so unmanifestly against the weight of the evidence as to show a misconception by the jury of its duties.")

## OKLAHOMA

*Walker v. St. Louis - San Francisco Ry. Co.*, 646 P.2d 593, 599 (Okla. 1982) ("The issue of damages is left to the judgment of the jury, subject to our correction only if the jury was activated by prejudice or guilty of 'abuse and passionate exercise.'")

## OREGON

*Huston v. Trans-Mark Services, Inc.*, 45 Or. App. 801, 609 P.2d 848, 853-54 (1980) ("As to excessiveness of the damage award, the Supreme Court [of Oregon has held] that since the adoption of the constitutional amendment, Art. VII, § 3, there is no judicial review of a jury verdict merely for excessiveness of damages.")

## PENNSYLVANIA

*Lewis v. Pruitt*, 37 Pa. Super. 419, 487 A.2d 16, 22 (1985) ("This court will not find a verdict excessive unless it is so excessive as to shock our sense of justice.")

## RHODE ISLAND

*Bruno v. Caianiello*, 121 R.I. 913, 404 A.2d 62, 65 (1979) ("We shall not disturb a jury's award unless the amount awarded 'shocks the conscience,' or indicates that the jury was influenced by 'passion or prejudice,' or that it proceeded on some erroneous basis.")

## SOUTH CAROLINA

*Easler v. Hejaz Temple A.A.O.N.M.S. of Greenville, S.C.*, 285 S.C. 348, 329 S.E.2d 753, 758 (1985) ("It is only when the verdict is so grossly excessive and the amount awarded so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other consideration not found on the evidence that it becomes the duty of this court, as well as of the trial court, to set aside the verdict absolutely.")

## SOUTH DAKOTA

*Koenig v. Weber*, 84 S.D. 558, 174 N.W.2d 218, 225 (1970) ("A verdict which is not derived from the mere process of computation will not be interfered with unless it is so excessive or so grossly inadequate as to indicate prejudice, passion, partiality or corruption on the part of the jury, or unless based upon a clear misconception.")

## TENNESSEE

*Clark v. Engelberg*, 58 Tenn. App. 721, 436 S.W.2d, 465, 468 (1968) ("The amount of the verdict is primarily for the jury to determine. . . . It is not within the province of an appellate court to substitute its judgment for that of the jury and the Trial Judge.")

## TEXAS

*Country Roads, Inc. v. Witt*, 737 S.W.2d 362, 365 (Tex. Civ. App. 1987) ("The amount to be recovered rests primarily within the discretion of the jury; it will not be disturbed on appeal on the ground of excessiveness in the absence of a clear showing of passion, bias, or prejudice and a finding that the award is so excessive as to shock the conscience of the court.")

## UTAH

*Bennion v. LeGrand Johnson Const. Co.*, 701 P.2d 1078, 1084 (Utah 1985) ("A reviewing court will defer to a jury's damage award unless the award indicates that the jury disregarded competent evidence, . . . or that the award is so excessive beyond rational justification as to indicate the effect of improper factors in the determination, . . . or that 'it clearly appears that the award was rendered under [a] misunderstanding.' ")

## VERMONT

*Larmay v. Van Etten*, 129 Vt. 368, 278 A.2d 736, 740 (1971) ("This court will not interfere unless it appears that the jury's determination is so small or large that it plainly indicates the award was the product of prejudice or other misguidance which undermines its validity as a verdict.")

## VIRGINIA

*Gazette, Inc. v. Harris*, 229 Va. 1, 325 S.E.2d 713, 740 (1985) ("Unless the amount of the award is so excessive as to shock the conscience of the court, or to create the impression that the jury was influenced by passion or prejudice, a verdict approved by the trial court will not be disturbed on appeal.")



## WASHINGTON

*Kirk v. Washington State University*, 109 Wash. 2d 448, 746 P.2d 285, 294 (1987) ("The determination of the amount of damages is primarily and peculiarly within the province of the jury, and an appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have resulted from passion or prejudice.")

## WEST VIRGINIA

*Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791, 800 (W. Va. 1986) ("In West Virginia, an appellate court will not set aside a jury verdict upon the claims that it is excessive, 'unless the verdict is monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and such as manifestly shows jury passion, partiality, prejudice, or corruption.'")

## WISCONSIN

*Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 405 N.W.2d 354, 374 (Wisc. App. 1987) ("If there is any credible evidence which under any reasonable view supports the jury finding as to the amount of damages, especially where the verdict has the approval of the trial court, this court will not disturb the finding unless the award shocks the judicial conscience.")

## WYOMING

*Union Pacific R.R. v. Richards*, 702 P.2d 1272, 1278 (Wyo. 1985) ("Where law thus provides no specific measure for quantifying damages, the amount to be awarded rests almost totally within the discretion of the jury, and courts, both trial and

appellate, are reluctant to interfere with that decision unless by its excessiveness or inadequacy the award carries with it an implication of passion, prejudice or bias or the result of some erroneous error.'")

## FIRST CIRCUIT

*Segal v. Gilbert Color Systems, Inc.*, 746 F.2d 78, 80-81 (1st Cir. 1984) ("This Court has consistently declined to play Monday morning quarterback in reviewing a jury's assessment of damages. A verdict should stand unless it is 'grossly excessive,' 'inordinate,' 'shocking to the conscience of the court,' or 'so high that it would be a denial of justice to permit it to stand.'")

*LaForest v. Autoridad de Las Fuentes Fluviales de Puerto Rico*, 536 F.2d 443, 447 (1st Cir. 1976) ("[T]he jury's otherwise supportable verdict stands unless 'grossly excessive' or 'shocking to the conscience.'")

## SECOND CIRCUIT

*Wheatley v. Ford*, 679 F.2d 1037, 1039 (2d Cir. 1982) ("When reviewing a claim of excessive damages, an appellate court must accord substantial deference to the jury's determination of factual issues.")

## THIRD CIRCUIT

*Rocco v. Johns-Manville Corp.*, 754 F.2d 110, 114 (3d Cir. 1985) ("Our scope of review is narrow, and we must affirm the jury's damage award unless it is so grossly excessive as to shock the judicial conscience.")

*W.A. Wright, Inc. v. KDI Sylvan Pools, Inc.*, 746 F.2d 215, 219 (3d Cir. 1984) ("A jury award of

damages is not to be upset so long as there exists sufficient evidence on the record which, if accepted by the jury, would sustain the verdict.")

#### FOURTH CIRCUIT

*Martin v. Fleissner GMBH*, 741 F.2d 61, 65 (4th Cir. 1984) ("The amount of damages is peculiarly within the discretion of the jury and subject to correction . . . by an appellate court only 'in those extreme cases in which the amount assessed is so shockingly excessive as manifestly to show that the jury was actuated by caprice, passion, or prejudice.' ")

*Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 201 (4th Cir. 1982), *cert. denied*, *Aetna Casualty and Surety Co. v. U.S.*, 460 U.S. 1102 (1983), on rehearing, 712 F.2d 899, *cert. denied*, 464 U.S. 1040 (1984) ("Our review . . . is only to assess whether on an independent review of the evidence . . . the awards were so 'untoward, inordinate, unreasonable or outrageous,' . . . that we must set them aside in exercise of our review power.")

*Compton v. Wyle Laboratories*, 674 F.2d 206, 209 (4th Cir. 1982) ("The assessment of damages is entrusted to the jury, and is not subject to review unless unconscionable or motivated by extreme prejudice.")

#### FIFTH CIRCUIT

*Wallace v. Oceaneering International*, 727 F.2d 427, 439 (5th Cir. 1984) ("When a jury as primary fact finder awards a certain measure of damages and the court refuses to upset that finding, we are not at liberty to reverse those decisions absent a definite finding of error.")

*Wood v. Diamond M Drilling Co.*, 691 F.2d 1165, 1168 (5th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983), ("We have repeatedly held that a jury's award is not to be disturbed unless it is so large as to 'shock the judicial conscience,' indicate 'bias, passion, prejudice, corruption, or other improper motive' on the part of the jury, . . . or is 'contrary to all reason.' ")

*Adams v. Ford Motor Credit Co.*, 556 F.2d 737, 740 (5th Cir. 1977) ("[I]t is only in case the amount awarded by a jury appears to be so excessive as to be unconscionable and to arise from bias or prejudice that the appellate court considers it appropriate to intervene.")

#### SIXTH CIRCUIT

*American Anodco, Inc. v. Reynolds Metals Co.*, 743 F.2d 417, 424 (6th Cir. 1984) ("This court will not overturn a jury verdict on the basis of the amount of the award if the verdict is within the range of proof and the jury was properly instructed.")

*Hammonds v. Ingram Industries, Inc.*, 716 F.2d 365, 373 (6th Cir. 1983) ("This is not a case where the verdict is unsupported by evidence and the jury was motivated by passion, prejudice or improper considerations. Accordingly, we decline to disturb the judgment on this ground.")

#### SEVENTH CIRCUIT

*Levka v. City of Chicago*, 748 F.2d 421, 424 (7th Cir. 1984) ("In reviewing a jury verdict for damages to determine whether it is excessive, we must defer to the judgment of the jury unless the award is 'monstrously excessive' or 'so large as to shock the conscience of the court.' ")

*Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 971 (7th Cir. 1983) ("We therefore would not set aside a jury's verdict as excessive unless . . . the verdict was 'monstrously excessive' . . . or in the equivalent formulation of the Indiana courts 'so excessive as to be flagrantly outrageous and extravagant.' ")

### EIGHTH CIRCUIT

*Dabney v. Montgomery Ward & Co., Inc.*, 761 F.2d 494, 501 (8th Cir.), *cert. denied*, 474 U.S. 904 (1985) ("[W]e shall . . . consider review . . . not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is a 'plain injustice' or a 'monstrous' or 'shocking result.' ")

*Herold v. Burlington Northern, Inc.*, 761 F.2d 1241, 1248 (8th Cir.), *cert. denied*, 474 U.S. 888 (1985) ("When a verdict is so excessive it shocks the conscience of this court, it will be set aside.")

*Ferren v. Richards Mfg. Co.*, 733 F.2d 526, 531 (8th Cir. 1984) (Jury assessment of damages "will not be overturned by this Court unless there is a 'plain injustice' or a 'monstrous' or 'shocking result.' ")

### NINTH CIRCUIT

*Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1501 (9th Cir. 1986) ("A jury's finding of the amount of damages must be upheld unless the amount is clearly not supported by the evidence and is grossly excessive, monstrous, or shocking to the conscience.")

*Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1216 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007, *reh.*

*denied*, 471 U.S. 1120 (1985) ("Generally, we will not reverse the jury's assessment of the amount of damages unless the amount is 'grossly excessive or monstrous,' . . . or unless the evidence clearly does not support the damage award.")

*Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204, 1208 (9th Cir. 1982) ("Only where the reviewing court is left with a 'definite and firm conviction that a mistake has been committed' will the damage award be disturbed.")

### TENTH CIRCUIT

*Acree v. Minolta Corp.*, 748 F.2d 1382, 1388 (10th Cir. 1984) ("[A]bsent an award so excessive or inadequate as to shock the conscience and to raise an irresistible inference that passion, prejudice, corruption, or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate.")

*Hudson v. Smith*, 618 F.2d 642, 646 (10th Cir. 1980) ("A jury's verdict regarding the amount of damages should be upheld unless it is clearly erroneous, or there is no evidence to support it.")

### ELEVENTH CIRCUIT

*Clark v. Beville*, 730 F.2d 739, 741 (11th Cir. 1984) ("Our review of the excessiveness of the jury's verdict is limited to an examination of the plaintiff's injuries to determine whether the damage award is beyond the maximum possible award supported by the evidence in the record.")

### D.C. CIRCUIT

*Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1238-39, (D.C. Cir. 1984) ("In reviewing the actual



amount of a jury's award, our task is limited and a reluctance to interfere is our touchstone. . . . Our inquiry ends once we are satisfied that the award is within a reasonable range and that the jury did not engage in speculation or other improper activity.")

#### FEDERAL CIRCUIT

*Weiner v. Rollform Inc.*, 744 F.2d 797, 808 (Fed. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) ("Jury damage awards, unless the product of passion and prejudice, are not easily overturned or modified on appeal.")

**AMICUS CURIAE**

**BRIEF**

JAN 19 1989

JOSEPH E. SPANIOLO, JR.  
CLERK

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No. 88-556

IN THE

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1988

**BROWNING-FERRIS INDUSTRIES OF  
VERMONT, INC. and BROWNING-FERRIS  
INDUSTRIES, INC.,**

**Petitioners,**

**-v.-**

**KELCO DISPOSAL, INC. and JOSEPH  
KELLEY,**

**Respondents.**

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**BRIEF FOR AMICUS CURIAE,  
THE CITY OF NEW YORK**

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**BRIEF FOR AMICUS CURIAE,  
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---

**INTEREST OF AMICUS CURIAE**

The City of New York submits this brief in support of reversal of the judgment of the Court of Appeals for the Second Circuit. In the instant case, the Court of Appeals affirmed a judgment of the United States District Court for the District of

Vermont which, in part, awarded the plaintiffs compensatory damages in the amount of \$51,146 and punitive damages in the amount of \$6 million. The Court of Appeals rejected a challenge to the award of punitive damages based upon the Excessive Fines Clause of the Eighth Amendment of the United States Constitution. That Court stated in its decision that "[e]ven if the eighth amendment does apply to this nominally civil case . . . , we do not think the damages here were so disproportionate as to be cruel, unusual, or constitutionally excessive." Kelco Disposal v. Browning-Ferris Industries of Vermont, 845 F.2d 404, 410 (2d Cir. 1988), cert. granted, \_\_\_ U.S. \_\_\_, 109 S.Ct. 527 (1988).

This is the third case in recent years to bring before this Court the issue of the Eighth Amendment's effect upon awards of punitive damages. In both Bankers Life and

Casualty Co. v. Crenshaw, \_\_\_U.S.\_\_\_, 108 S. Ct. 1645 (1988), and Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986), this Court resolved the case without having to address this recurring constitutional issue. In both cases, various amici curiae informed the Court about the growth in recent years of the frequency and size of awards of punitive damages. These amici curiae have most often been insurance companies and defense counsel.

The City of New York has also felt the sting of this growth of punitive damage awards. The City suffers even though it is immune from a direct assessment of punitive damages under both New York law and the federal civil rights statutes. Sharapata v. Town of Islip, 56 N.Y.2d 332, 452 N.Y.S.2d 347 (1982); City of Newport v. Fact Concerns, Inc., 453 U.S. 247 (1981).



This immunity does not shield the City from the weight of punitive damages. The City has frequently indemnified City employees who have been assessed punitive damages in civil cases. This indemnification arises from section 50-k of the New York General Municipal Law (McKinney 1986). General Municipal Law §50-k(2) requires the Corporation Counsel, upon the commencement of an action against a City employee, to make an initial determination whether the act or omission at issue "occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred." Once the Corporation Counsel makes that determination in the employee's favor, the City provides for the defense of the employee in that civil action.

General Municipal Law §50-k(3) provides that the City indemnify its employees for any judgment arising from an action or omission which "occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged damages were sustained." The statute further provides that the duty to indemnify does not arise "where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee."

The City has borne the weight of punitive damages in cases where the Corporation Counsel believes that the employee acted properly within the scope of his or her employment. Once that determination is made, the City does not abandon employees because the jury reaches

a contrary conclusion, perhaps influenced by the vision of a deep pocket. The City indemnifies its well-intentioned employees regardless of the jury verdict. Thus does the City feel the sting of escalating punitive damages.

Even apart from indemnification, the specter of punitive damages affects the City by affecting the attitude of its employees. The high profile of the City's perceived deep pocket may encourage punitive awards where not even compensatory damages are appropriate. The best judgment of conscientious City employees may understandably be chilled by the prospect of punitive damages. The skyrocketing levels of these awards make this delicate situation that much more chilling.

#### **SUMMARY OF ARGUMENT**

The antecedents of the Excessive Fines Clause applied to financial penalties which



were assessed in civil cases. History indicates that the Excessive Fines Clause does not apply only in criminal cases. Punitive damages, on the other hand, serve the purposes of punishment and deterrence, classic goals of the criminal justice system. Applying the Excessive Fines Clause to punitive damages will foster a strong public policy in restoring that part of the tort system to rationality. Should this Court hold that punitive damages come within the scope of the Excessive Damages Clause, legislative reforms of the tort system will likely follow.

#### POINT I

#### THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT IS APPLICABLE TO PUNITIVE DAMAGES.

In a case involving the Cruel and Unusual Punishments Clause, this Court stated that "[s]ome punishments, though not labeled 'criminal' by the State, may be

sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." Ingraham v. Wright, 430 U.S. 651, 669, n.37 (1977). As that passage implies, this issue cannot be resolved as a simple exercise in taxonomy. It would be a gross simplification to state that the Excessive Fines Clause exists in a purely criminal corner of the world, that punitive damages are off in a purely civil corner of the world, and that never the twain shall meet. The history of the Excessive Fines Clause is entwined with a variety of civil devices which assessed financial penalties for punishment and deterrence. The modern device of punitive damages exists to punish and deter without regard to compensation, classic goals of our criminal justice system. This Court will have to go beyond labels and consider the

true mission of the Excessive Fines Clause in our modern society.

**A. The Civil History of the Excessive Fines Clause**

The history of the Excessive Fines Clause and the Eighth Amendment generally has been set forth in a variety of writings. This Court has discussed the origins of the Eighth Amendment in two recent cases involving the Cruel and Unusual Punishments Clause. See Solem v. Helm, 463 U.S. 277, 284-286 (1983); Ingraham v. Wright, *supra*, 430 U.S. at 664-666. The Supreme Court of Georgia recently examined that history in Colonial Pipeline Co. v. Brown, 258 Ga. 115, 365 S.E.2d 827 (1988), appeal dismissed, \_\_\_ U.S. \_\_\_, 109 S.Ct. 36 (1988). Three recent law review articles present the history of the Excessive Fines Clause in depth. See Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons From History, 40 Vand. L. Rev. 1233,



1240-1269 (1987); Note, The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment, 85 Mich. L. Rev. 1699, 1714-1719 (1987); Jeffries, A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 153-158 (1986). The briefs in the Bankers Life and Aetna cases discussed that history, as undoubtedly will the various briefs submitted in this matter. The following discussion is a look at only the highlights of that history.

The adoption of the Eighth Amendment was not accompanied by extensive debate on the scope of the Excessive Fines Clause. The First Congress proposed the Eighth Amendment to the state legislatures on September 25, 1789. It read and still reads that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The

Amendment was ratified on December 15, 1791. Congress had reacted to calls for a written Bill of Rights by proposing what are now the first ten amendments to our Constitution. The Eighth Amendment was not the product of Congress' creative draftsmanship; it was taken almost verbatim from the Virginia Declaration of Rights of 1776. Congress debated this amendment very briefly. None of the debate was devoted to the scope of the Excessive Fines Clause. Massey, supra p. 9, at 1241-1242.

Immediately prior to taking up the Eighth Amendment, Congress considered the Fifth Amendment. Id. There was debate about whether the privilege against self-incrimination should apply in civil proceedings. The result was an amendment which specifically limited that privilege to criminal cases. Such limiting language was not included in the Excessive Fines Clause.

The concept of "excessive fines" is equally capable of application in civil cases as is the concept of "self-incrimination," which Congress felt obliged to limit expressly.

Punitive damages in their modern shape were practically unknown in this country in 1789. Indeed, the first reported English cases expounding the concept of punitive damages in the modern form had been decided only in 1763. Massey, supra p. 9, at 1266; Note, supra p. 10, - at 1718, n. 126. The Excessive Fines Clause was not adopted with punitive damages as we now know them in mind. In determining whether the Excessive Fines Clause regulates punitive damages, the policy behind the Clause is the soundest guide to its scope. To define that policy, one must examine the historical antecedents of the Eighth Amendment, antecedents which the First Congress adopted for use on the national level.



Congress took the Eighth Amendment almost verbatim from the Virginia Declaration of Rights. Section nine of the Virginia Declaration of Rights stated "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Virginia Convention of 1776 adopted the Declaration of Rights as well as proposing that the thirteen colonies declare their independence. George Mason was the author of the Declaration of Rights. Mason's declared purpose was to claim "the Liberties & Privileges of Englishmen, in the same Degree, as if we had still continued among our Brethren in Great Britain." Solem v. Helm, supra, 463 U.S. at 286, n. 10. The Declaration of Rights preserved the rights of Englishmen, amassed over centuries, for the pioneers of Virginia. The First Congress also intended to preserve the rights of

Englishmen in its borrowing of the Excessive Fines Clause for the national Bill of Rights.

George Mason was not the originator of the Excessive Fines Clause any more than was the First Congress. He took the language verbatim from the English Bill of Rights of 1689. Parliament enacted that Bill of Rights in the wake of the Glorious Revolution, in which William and Mary acceded to the throne upon the flight of James II to France. See Massey, supra p. 9, at 1243-1250. William's acknowledgement of the Bill of Rights was a significant step on the road to a constitutional monarchy. Parliament restated the rights of Englishmen that had been previously recognized and upon some of which James II had trampled. One of those restated rights was "That excessive bail plight not to be required, nor excessive fines imposed, nor cruel and unusual

punishments inflicted." This provision, delineated as Article 10, is the obvious progenitor of the Eighth Amendment.

In 1689, the English law of financial punishment was in flux. Fines in the modern sense were coming into regular practice as criminal sanctions. On the wane was another device known as an amercement. Amercements were financial penalties, payable to the Crown, which could be assessed in both criminal and civil cases. In what we would now call tort cases, a defendant would be assessed damages in favor of the plaintiff and an amercement to be paid to the Crown because of his unacceptable behavior. Amercements were phasing out in the seventeenth and eighteenth centuries, to be replaced by criminal fines and punitive damages. In 1689, the separation was not yet so clear. Cases of that time sometimes discussed fines



and amercements indiscriminately, and Blackstone spoke of some civil causes of action which resulted in fines to the Crown. See Massey, supra p. 9, at 1252-1253, 1261-1269; Note, supra p. 10, at 1715-1716.

The Bill of Rights sought to codify the rights of Englishmen in 1689. A major source of those rights was the Magna Carta. The Great Charter of 1215 devoted an entire chapter to limiting excessive amercements, which applied to disapproved behavior in both criminal and civil contexts.

Amercements were an early precursor of modern punitive damages. In addition to paying for the damage he caused, a defendant would have to pay another sum as punishment. Whereas that sum would then go to the Crown, it now goes to the civil plaintiff. Massey, supra p. 9, at 1259-1261. The barons at Runnymede wrote limitations on excessive amercements into the Magna

Carta. In 1689, Parliament used the word "fines" at a time when the legal concepts and devices were changing. Id. at 1252-1253. It is unlikely that Parliament was abandoning the protection citizens enjoyed against excessive penalties clothed in civil garb, whether payable to the Crown or to the plaintiff. The Virginia Convention and the First Congress adopted the words of the English Bill of Rights so that Americans would have those same rights of Englishmen. The history of the Excessive Fines Clause is that it forbids excessive financial penalties, regardless of whether the procedural setting is nominally criminal or civil.

**B. The Criminal Nature of Punitive Damages**

That punitive damages have a criminal side to them is an unremarkable proposition. This Court has described punitive damages as "private fines levied by civil juries to punish reprehensible conduct and to deter

its future occurrence." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). See, also, Memphis Community School District v. Stachura, 477 U.S. 299, 306, n. 9 (1986). Punitive damages indeed are a fine assessed to advance public policies. The aims of punishment and deterrence are traditional reasons behind the criminal justice system. The payment of punitive damages to plaintiffs rather than to the government should not obscure the essentially penal nature of punitive damages, which are not compensatory in any fashion.

Vermont law views punitive damages in the same light. In Pezzano v. Bonneau, 133 Vt. 88, 92, 329 A.2d 659, 661 (1974), the Supreme Court of Vermont stated that "Punitive damages are awarded to 'stamp the condemnation of the jury upon the acts of defendant on account of their malicious or oppressive character' . . . ." The law of



New York is the same. In Loughry v. Lincoln First Bank, 67 N.Y.2d 369, 377, 502 N.Y.S.2d 965, 969, (1986), the New York Court of Appeals stated that:

Unlike damages that compensate an individual for injury or loss, punitive damages - damages over and above full compensation, and in that sense a windfall for the plaintiff - serve the societal purposes of punishing and deterring the wrongdoer, as well as others, from similar conduct in the future [cite omitted].

In the instant matter, the Court of Appeals for the Second Circuit referred to punishment and deterrence as the purposes of punitive damages. Kelco Disposal v. Browning-Ferris Industries of Vermont, supra, 845 F.2d at 409.

The twin aims of punitive damages are retribution and deterrence, described by this Court as "the traditional aims of punishment . . . ." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963). Although nominally part of a civil case,

punitive damages have a strong streak of criminal law in them. That payment goes to a plaintiff rather than to the government is of no matter. Punitive damages are a criminal/civil hybrid much like their ancient ancestors, the amercements. Where the Magna Carta protected Englishmen against excessive amercements, so does the Excessive Fines Clause protect Americans against excessive punitive damages.

#### **C. Recent Relevant Precedents**

This Court has never considered whether punitive damages come within the scope of the Excessive Fines Clause. Several other courts have recently considered that question. In Miller v. Cudahy Co., 858 F.2d 1449, 1459 (8th Cir. 1988), the Court of Appeals for the Eighth Circuit held, without extensive discussion, that punitive damages did not come within the scope of the Eighth Amendment. In

Electro Services v. Exide Corp., 847 F.2d 1524, 1530 (11th Cir. 1988), the Court of Appeals for the Eleventh Circuit held that "the Excessive Fines Clause does not apply in the civil context."

The Supreme Court of Alabama considered this issue in Industrial Chemical & Fiberglass Corp. v. Chandler, \_\_\_So.2d\_\_\_, 1988 WL 127142 (Ala. 1988). That Court held that "punitive damages awarded in a civil proceeding are not subject to the constitutional restrictions of the Eighth Amendment, which applies to criminal proceedings only." That Court relied heavily upon Ingraham v. Wright, supra, 430 U.S. at 664-668. Also relying on Ingraham to reach the same result was the Supreme Court of Colorado in Palmer v. A. H. Robins Co., 684 P.2d 187, 217 (Colo. 1984) (en banc).



In Ingraham, this Court held that the Cruel and Unusual Punishments Clause applied only in criminal matters. That case involved the factually special area of corporal punishment in public schools. It did not consider the Excessive Fines Clause. Ingraham v. Wright, supra, 430 U.S. at 664-669.

One Court which has considered this issue recently is the Supreme Court of Georgia. In Colonial Pipeline Co. v. Brown, supra, 258 Ga. 115, 365 S.E.2d 827, that Court held that the Excessive Fines Clause of the Georgia Constitution, identical to that in the Eighth Amendment, did apply to the award of punitive damages. The Court examined the English antecedents of the Excessive Fines Clause and found there protection against excessive fines in a civil setting. Because it resolved the case on state constitutional grounds, the Court did

not need to decide the federal constitutional issue. It did point out, however, that "Ingraham dealt only with the cruel and unusual punishment clause of the Eighth Amendment, it did not concern the excessive fines clause." Id. at 829. The Georgia Supreme Court reached its conclusion by examining history and the purposes of the Excessive Fines Clause. This Court should make a similar finding of constitutional protection against excessive punitive damages.

**D. The Societal Need for Such Constitutional Protection**

The many briefs submitted to this Court on this issue have outlined the expansion in the number and size of punitive damage awards. The heaviest burden has undoubtedly fallen upon business and industrial concerns, whose deep pocket and often impersonal face make them targets for juries. These lightning-bolt transfers of

wealth must have implications for how business and litigation will be carried on in the future. The City, as was discussed above, is also a target for awards of punitive damages. In an era of tight municipal finances, an excessive award of punitive damages can put a substantial crimp in the public treasury. Public services conceivably could suffer in the wake of such an award.

Most current judicial review of punitive damage awards is toothless. In Gertz v. Robert Welch, Inc., supra, 418 U.S. at 350, this Court remarked that "[i]n most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive." This Court relied in part on the gentleness of such review to ban, under the First Amendment, punitive damages in defamation actions against publishers and broadcasters. In



Vermont, courts review awards of punitive damages only to determine whether they are "manifestly and grossly excessive." Greenmoss Builders v. Dun & Bradstreet, 143 Vt. 66, 77, 461 A.2d 414, 420 (1983), aff'd, 472 U.S. 749 (1985). The New York Court of Appeals has stated that "the amount of exemplary damages awarded by a jury should not be reduced by a court unless it is so grossly excessive 'as to show by its very exorbitancy that it was actuated by passion' [cites omitted]." Nardelli v. Stamberg, 44 N.Y.2d 500, 504, 406 N.Y.S. 2d 443, 445 (1978).

The Excessive Fines Clause mandates judicial control of punitive damage awards under some concrete form of proportionality analysis. The existence of such a constitutional requirement will motivate the states to reform their tort systems, either through legislative action or common-law

judicial change. It is likely that state procedures would come into place to perform this constitutional mandate. Federal courts would most likely not face an onerous increase in cases once the states react to this Court's holding that punitive damages do indeed come within the ambit of the Excessive Fines Clause of the Eighth Amendment.

## **POINT II**

**THE EXCESSIVE FINES CLAUSE  
OF THE EIGHTH AMENDMENT  
REQUIRES THAT AN AWARD OF  
PUNITIVE DAMAGES BE  
PROPORTIONAL TO CULPABILITY  
AS MEASURED BY ANY NUMBER  
OF CONCRETE CRITERIA.**

The concept of excessiveness contains within it a test of proportionality. The essence of the Excessive Fines Clause is that persons not be saddled with financial penalties which are out of line with some objective criteria.

This Court applied the concept of proportionality in Solem v. Helm, supra, 463 U.S. 277. That case involved the Eighth Amendment, albeit the Cruel and Unusual Punishment Clause rather than the Excessive Fines Clause. This Court held that the Cruel and Unusual Punishments Clause requires that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Id. at 290. This Court then instructed that "courts should be guided by objective factors that our cases have recognized. Id. at 290-292. The Court summarized the standards of review (Id. at 292):

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.



Directly applicable to the instant case is the requirement of objective criteria by which to measure the proportionality of an award of punitive damages.

The Georgia Supreme Court declared an award of punitive damages excessive under the Excessive Fines Clause of its state constitution in Colonial Pipeline Co. v. Brown, supra, 258 Ga. 115, 365 S.E.2d 827. In that case, a bulldozer was destroyed when it struck and ruptured an underground petroleum pipeline. There was evidence that the pipeline company negligently failed to mark the pipeline. No personal injury resulted from the accident. The jury awarded to the bulldozer owner compensatory damages of about \$53,000 and punitive damages of \$5 million. The trial court denied a motion by the pipeline company for a new trial as to punitive damages. The

Supreme Court reversed that denial (Id. at 833):

We, therefore, reverse the \$5,000,000 award as being excessive because (1) any negligence present was passive; (2) there was no bodily injury to this plaintiff, and the award does not bear a rational relationship to the actual damages award; (3) there is no rational relationship between the offense and the punishment in that the punitive damage award was 100 times the property damage award.

The Georgia Supreme Court thus considered the type of culpable conduct, the type of injury suffered, and the relationship between the compensatory damages and the punitive damages.

The criteria applied by the Georgia Supreme Court are sound guidelines for applying the Excessive Fines Clause. An assessment of the defendant's culpability is relevant to the inquiry. A more objective criterion, however, is the benefit which the defendant gained or reasonably expected to

gain from the culpable behavior. Another objective criterion is the amount of actual injury which the plaintiff suffered. As suggested by the Helm case, another relevant criterion is the level of punitive damage awards in cases involving similar behavior. Another objective criterion is the statutory penalty, whether civil or criminal, imposed upon the behavior in question under a statutory cause of action or a penal code.

One criterion which lacks validity is the defendant's worth or income. Keying an award to those factors will lead to wildly different awards for the same behavior. Such a principle is not tolerated in the area of criminal law and should not be tolerated here.

Objective standards would structure jury deliberations. The standards would also put teeth into judicial review of punitive damage awards, requiring more than the



vague and deferential review which now exists.

Indeed, without objective standards like these, the jury is turned loose without practical bounds on its discretion. Such standardless discretion can only lead to awards which are excessive under the Eighth Amendment. An absence of standards also may in itself violate the Due Process Clauses of the Fifth and Fourteenth Amendments. This Court applied that analysis in a criminal setting in United States v. Batchelder, 442 U.S. 114 (1979). In Bankers Life and Casualty co. v. Crenshaw, supra, \_\_\_U.S. \_\_\_, 108 S. Ct. at 1654-1656, in a concurring opinion, Justice O'Connor suggested the relevance of such a Due Process analysis in the area of punitive damages.

## **CONCLUSION**

Punitive damages come within the scope of the Excessive Fines Clause of the Eighth Amendment. Such damages must be proportional as measured by objective criteria. The award of punitive damages in this case is not proportional to any objective criterion. The judgment of the Second Circuit should thus be reversed.

Respectfully submitted,

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**AMICUS CURIAE**

**BRIEF**



MOTION FILED  
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No. 88-556

14

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

Browning-Ferris Industries of Vermont, Inc., and  
Browning-Ferris Industries, Inc.,  
*Petitioners,*

v.

Kelco Disposal, Inc., and Joseph Kelley,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND BRIEF AMICUS CURIAE OF METROMEDIA, INC.  
IN SUPPORT OF THE PETITIONERS

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
OF METROMEDIA, INC. IN SUPPORT OF THE  
PETITIONERS

---

Pursuant to Rule 36.3 of the rules of this Court, *amicus* Metromedia, Inc. ("Metromedia") hereby moves for leave to file the attached brief *amicus curiae*. Petitioners have granted but respondents have refused consent for Metromedia to file a brief *amicus curiae* in this case.

Metromedia is presently before this Court as petitioner in *Metromedia, Inc. v. April Enterprises, Inc.*, petition for cert. filed, No. 88-625, Oct. 14, 1988,

*stay granted*, Oct. 11, 1988 (A-242). Metromedia's petition presents both Eighth Amendment and due process questions in the context of challenging the constitutionality of a \$14,000,000 punitive damage award against it. To Metromedia's knowledge, this award is the second largest punitive damage award ever affirmed by the California appellate courts.

Metromedia contends, as this Court has recognized, that the Eighth Amendment contains protections similar to those required in other contexts by due process. Metromedia's brief takes the position that the protections of the Eighth Amendment include the right to advance notice of what conduct may give rise to the imposition of punitive damages and the maximum punitive exposure authorized for engaging in such conduct. Accordingly, Metromedia contends in the attached brief that the \$6,000,000 punitive fine awarded in the case at bar is invalid under the Excessive Fines Clause because Vermont law, under which it was imposed, prescribes no limit on the amount of monetary punishment that could be imposed for engaging in the underlying conduct.

Metromedia believes that neither the petitioners nor any other amici intend to brief the issue whether the Eighth Amendment requires advance legislative determination of the basis for, and extent to which, punitive damages may be imposed. Because of this, and because of its direct and substantial stake in the

resolution of the case at bar, Metromedia requests leave to brief this issue as *amicus curiae*.

January 19, 1989

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**QUESTION PRESENTED**

The Court has granted certiorari on the question whether the Excessive Fines Clause of the Eighth Amendment applies to punitive damage awards imposed in civil cases. Metromedia will address the question whether the Excessive Fines Clause prohibits the imposition of a punitive damage award in a case in which the applicable state law does not establish the maximum punishment to which the defendant could be exposed for the conduct found to warrant punishment.

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**BRIEF OF METROMEDIA, INC.  
AS AMICUS CURIAE IN SUPPORT OF THE  
PETITIONERS**

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**INTEREST OF THE AMICUS CURIAE**

In a case presently on this Court's docket, *amicus curiae*, Metromedia, Inc. ("Metromedia"), seeks review of a California jury's \$14,000,000 punitive damage award as violative of the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment. *Metromedia, Inc. v. April Enterprises, Inc.*, No. 88-625, *petition for cert. filed*, Oct. 14, 1988, *stay granted*, Oct. 11, 1988 (A-242). Metromedia's liability for punitive damages was predicated on the jury's determination that, in erasing certain television videotapes, Metromedia had breached an implied obligation arising from a written contract. California's statute authorizing the imposition of punitive damages provides that they may be awarded only for the "breach of an obligation not arising from contract." Cal. Civ. Code § 3294 (West 1981). Neither that enactment nor any other California law establishes any limit on the amount of punitive damages that may be awarded in California. The \$14,000,000 punitive damage award against Metromedia exceeded the amount of the plaintiff's prayer by \$4,000,000. It was affirmed by an intermediate appellate court in an unpublished opinion. California Rules of Court, Rule 977. The California Supreme Court denied review. With the exception of a recent \$15,000,000 punitive damage award in another case,

*Eaton Corp. v. The PKL Companies, Inc.*, No. B010958 (Cal. Ct. App. July 18, 1988) (unpublished), Metromedia's is the largest punitive damage award ever affirmed by a California appellate court.

Metromedia supports the contention of petitioners in the case before this Court that punitive damages in civil cases are governmental fines imposed for the purpose of punishing and deterring perceived public wrongs and are therefore subject to the limitations of the Excessive Fines Clause of the Eighth Amendment. Metromedia contends in addition that the protection afforded by this provision of the Constitution includes the right to statutory, advance notice of the public wrongs for which society will extract punishment and the extent to which punishment will be inflicted for proscribed conduct. Metromedia intends in its brief to address this latter issue. Metromedia does not believe that petitioners, or any other of their amici in this case, will directly address this question, which arises out of the due process component of the Excessive Fines Clause of the Eighth Amendment.

#### STATEMENT OF THE CASE

The case at bar presents the question whether and to what extent the \$6,000,000 punitive damage award by the jury below is unconstitutional under the Excessive Fines Clause of the Eighth Amendment. However, if the Court determines that the Excessive Fines Clause applies to punitive damages, that holding would give rise to the logically implicit question whether *any* financial penalty of the type involved in this case may be imposed under the Excessive Fines Clause in the absence of legislatively established advance notification of the nature of the conduct that may result in

a penal assessment and the limits of the penalty that may be assessed for violating such a standard.<sup>1</sup>

As the court below observed, Vermont juries are vested "with enormous discretion to award punitive damages," and the Vermont courts view such punishment as incapable of any precise determination. *Kelco Disposal, Inc. v. Browning-Ferris Industries of Vermont, Inc.*, 845 F.2d 404, 409 (2d Cir.), cert. granted, 109 S. Ct. 527 (1988). As is true in most states that permit punitive damages, see Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 278-79 (1983), the Vermont legislature has not enacted any law that prescribes limits on the punishment that may be imposed by juries under the common law tort involved in this case. Thus, the question whether this particular \$6,000,000 fine is constitutionally excessive necessarily presupposes that punishment may be imposed in civil actions, whether by a jury or a court in the first instance, in the absence of a legislatively established limit on that punishment. Metromedia contends that absent such a limit, the award of *any* punitive damages is per se "excessive" within the meaning of the Excessive Fines Clause.

#### SUMMARY OF ARGUMENT

Punitive damages are extracompensatory financial sanctions imposed to vindicate society's retributive and deterrent interests in response to conduct that is perceived to be unacceptable. Under the punitive

<sup>1</sup> The Court need not reach the question of the circumstances under which a punitive damage award within a legislatively established limit could be subject to additional constitutional limitations under the Excessive Fines Clause.



damage system currently prevailing in almost every State, civil juries exercise virtually unfettered power to impose this form of punishment in whatever amount may seem appropriate in a particular case. Permitting juries to exercise this power violates a fundamental principle underlying the Excessive Fines Clause and its historical antecedents: limits on punishments must be prescribed in advance of their imposition. Historically, the responsibility for establishing appropriate levels and limits of punishment for antisocial conduct has been regarded as quintessentially that of the legislature. This history is directly relevant to and supports the conclusion that the Excessive Fines Clause forecloses punishment imposed pursuant to a system that does not contain and describe standards and limitations.

The Excessive Fines Clause is patterned after provisions in Magna Carta and the English Bill of Rights. The history of the excessive punishments components of these earlier charters demonstrates that one of their primary functions was to preclude capricious and excessive "amercements"—the common law antecedents of punitive damages—making them subject to pre-existing maximum limits established by local custom, ordinance or statute. In this way, prospective defendants were given notice of the potential consequences of engaging in disfavored conduct.

In the Colonies, the establishment of maximum punishments by statutes (or their equivalent) was commonplace, reflecting the Colonists' rejection of any system in which the level and severity of punishment were left to the *post hoc* discretion of juries or judges.

By the time of the ratification of the Fourteenth Amendment, the States had uniformly rejected the

concept of common law crime. All of the States had enacted comprehensive criminal codes in which substantive crimes were defined and specific ranges of punishment for these crimes had been legislatively enacted.

Punitive damages serve substantially the same purposes as criminal sanctions. Their award in the absence of legislatively prescribed limits therefore departs from the historical pattern that society's punishments must be preceded by adequate notice and pre-ordained limitations. The notice component of the Excessive Fines Clause, analogous to due process requirements applied in other contexts, condemns this practice.

States that permit the award of punitive damages in the absence of pre-existing statutory limits fail to provide the notice that is the necessary antecedent for constitutional punishment under the Excessive Fines Clause of the Eighth Amendment.

#### ARGUMENT

#### THE EXCESSIVE FINES CLAUSE PROHIBITS THE IMPOSITION OF PUNITIVE DAMAGES IN THE ABSENCE OF LEGISLATIVELY ESTABLISHED LIMITS ON THE MAXIMUM PUNISHMENT TO WHICH AN INDIVIDUAL MAY BE SUBJECTED FOR CONDUCT FOUND TO WARRANT PUNISHMENT

##### A. Punitive Damages are *Ad Hoc*, Capricious and Essentially Limitless Fines Imposed by Juries Without Standards, Uniformity or Predictability

In this case, the jury was guided by the compensatory function in determining the amount of actual damages necessary to make the plaintiff whole to re-

dress the private wrong. But the jury was not informed by the trial court what maximum and minimum penal assessment might be appropriate to fulfill society's objectives of deterrence and retribution to redress the public wrong; nor was the jury charged with any other meaningful standards or guidelines by which to make such a determination. The trial court could not provide the jury with such guidance because no limitations or objective standards have been established in Vermont to aid civil juries in performing retrospectively in individual cases the role assigned prospectively and generically in criminal cases to the legislature—that of prescribing the limits of permissible punishments for particular offenses.

In fact, civil juries are entrusted with the power to punish and to establish *ad hoc* levels of punishment in cases in which the substantive standards are themselves in a state of constant evolution. See *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 822 (1986). Having found liability under such mercurial standards of conduct,<sup>2</sup> civil juries are typically given guidance

<sup>2</sup> Although not to be considered in detail in this brief, Metro-media submits that the uncertainty regarding *what* conduct will warrant imposition of punitive damages reinforces its contention that the Excessive Fines Clause requires, at a minimum, that the limit of punishment be established in advance of the conduct supporting a punitive damage award. The problem is illustrated graphically by another case on this Court's docket in which the Supreme Court of Minnesota has imposed a \$4,000,000 punitive damage award on a defendant in a products liability case on the basis of its perceived deviation from a legal standard that was announced in that case by the highest court of the state and applied retroactively to a failure of the defendants to meet that standard seven years earlier. See *The Goodyear Tire & Rubber Co. v. Hodder*, No. 88-626, petition for cert. filed, Oct.

as to the award no more explicit than that the amount must be sufficient to punish and deter. See, e.g., *Standard Life Co. of Indiana v. Veal*, 354 So. 2d 239, 249 (Miss. 1977). As Justice O'Connor has observed, "the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury." *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1656 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Bankers Life and Casualty Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985)). Given this state of affairs, no person potentially subject to punitive damages can possibly know in advance how much punishment a jury might impose for his or her conduct. Moreover, appellate review is of no comfort because jury awards generally will be overturned only if a punitive award is subjectively perceived by appellate judges as "manifestly and grossly excessive," *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 77, 461 A.2d 414, 419-20 (1983), *aff'd*, 472 U.S. 749 (1985) (citation omitted), or happens to "shock [the] judicial conscience." *Ainsworth v. Combined Insurance Co. of America*, 763 P.2d 673, 677 (Nev. 1988); accord *Ace Truck & Equipment Rentals, Inc. v. Kahn*, 746 P.2d 132, 137 (Nev. 1987) (punitive damage award will not be disturbed so long as it is "fair and just and reasonable [according to the] sense [of right and wrong] most of us possess from childhood.").

Moreover, this system is activated in most cases by a private prosecutor who expects not only to be fully compensated for his own tangible and intangible

14, 1988, stay granted, Oct. 24, 1988 (O'Connor, Circuit Justice) (A-296).



losses, but to be rewarded by a windfall punitive damage award for his efforts. It is not surprising that a private citizen in that role would seek to extract from the defendant the largest possible punitive award irrespective of any relationship to the public purposes for which it is in theory inflicted. As has been observed, "[a] person who is to profit by the punishment of another is likely to prefer severe punishment to admonition which will best serve social ends, and the two are not necessarily synonymous . . . ." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1178 (1931).<sup>3</sup>

The result of this system is that no one potentially subject to punitive damages can ascertain, in advance of engaging in potentially punishable conduct, what punishment might be imposed as a consequence of that conduct. Comparing this system to the criminal justice system is instructive. In the latter system, generally applied in response to conduct society regards as its most reprehensible, persons must have notice in advance of what conduct is punishable, see *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Papachristou v. City of Jacksonville*, 405 U.S.

<sup>3</sup> The Court has recently noted the incongruity of a similar arrangement which at least had the virtue of turning over the punitive fine to the government. See *Young v. United States ex rel. Vuitton et Fils*, 107 S. Ct. 2124 (1987). In that case, the Court exercised its supervisory power to preclude appointment of interested private litigants to prosecute criminal contempt actions against opposing private litigants. Indeed, Justice Blackmun indicated in *Young* that, in his view, such a prosecutor must, as a matter of due process, be able to serve the public interest to the exclusion of any private interest and would therefore have reached the same result as a matter of constitutional compulsion. *Id.*, at 2141 (Blackmun, J., concurring).

156, 162 (1972); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966); *Connally v. General Construction Co.*, 269 U.S. 385, 390-93 (1926); and the relevant criminal code will already have described with reasonable specificity not only what conduct is punishable, but also the limit of punishment that may be imposed for engaging in that conduct. Beyond this universally available information, the Constitution interposes between all persons and the actual infliction of criminal punishment: (1) a prosecutor with no personal financial stake in the amount of punishment ultimately imposed; (2) often, an independent, neutral grand jury whose members determine, free of personal interest, whether a prosecution is warranted; (3) the requirement of proof beyond a reasonable doubt and other constitutional guarantees; and (4) the imposition of punishment by a judge who is presumptively experienced, professional and necessarily more capable than a jury of being able to tailor specific punishment within the legislature's explicit standards to society's objectives in imposing that punishment.

In the punitive damage system as it presently functions, the differences with the criminal system are substantial: (1) statutory definitions of the conduct for which punishment may be imposed, if they exist at all, are subjective and elastic; (2) the prosecutor-plaintiff (and his attorney) have a direct, immediate and substantial interest in the amount of punishment the jury can be incited to impose; (3) punishment may be predicated on a finding of "guilt" proved by a preponderance of the evidence by a jury that comes into existence to create and apply society's standards in a single case; and (4) punishment is then imposed



by the jury—a temporary, inexperienced and ephemeral institution with no accountability to society as a whole. Although these characteristics of the punitive damage system may also suggest that the Court should alter the procedural protections available to defendants in punitive damage cases, they provide compelling support for the more modest suggestion that the Excessive Fines Clause requires at least that maximum potential punishments be established prospectively by the legislature.

**B. English, Colonial and Early American Jurisprudence Rejected the Concept That Punishment Could Be Inflicted Without Express, Pre-Established Limits**

Under English law, amercements—the antecedents of modern punitive damage awards—were imposed in a two-step process. In the first step, the maximum potential amercement would be determined by the justices of the court, who had the duty to see that that amount was proportionate to the gravity of the offense. W. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 288 (2d ed. 1958). The history of amercements demonstrates that the justices themselves did not establish the limits on punishment on a case-by-case basis, but rather those limits generally were pre-established by custom, local rule or the equivalent of statutes. See J. Holt, *Magna Carta* 230-31 (1965); F. Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300-1629*, 361 (1948); see also Brief of Golden Rule Insurance Co., et al., as *Amici Curiae*, at 10, 19-20.

Once a court determined that a person should be amerced and ascertained the maximum amount of the amercement, a group of peers of that person, often having no knowledge of the facts relating to the

wrong involved, were charged with deciding whether the maximum available amercement should be imposed or whether a lesser sum—even no sum at all—should be assessed. *Id.*, at 10-11. Thus, the “jury” brought its broad and presumably merciful discretion to bear within pre-set limits, often imposing amercements at the end of the term of a particular court in all cases decided during that term, thereby achieving uniformity of punishment. *Id.*, at 16.

This engrained tradition of utilizing established limits to evaluate whether an amercement was proportionate to the specific offense was reaffirmed in the English Declaration of Rights of 1689 when the amercements clauses were carried over into Article 10, which contained the Excessive Fines Clause of that instrument. The drafters of the English Declaration of Rights of 1689 “wanted to prohibit punishments that were unauthorized by statute.” L. Schworer, *The Declaration of Rights, 1689*, 93-94 (1981). Thus, juries involved in the imposition of amercements and fines were not asked to make the kind of broad policy decisions regarding retribution and deterrence that are commonly made today by civil juries in cases involving punitive damages in which no maximum punishment has been prescribed by the legislature.

The principle that limits on punishments must be prescribed in advance of their imposition, and its corollary that such limits may not be set by juries on an *ad hoc* basis, were incorporated in our jurisprudence when the first Colonists arrived on the new continent in the early 17th Century. For example, Chapter III of “The General Laws and Liberties of New Plimouth Colony” sets forth a detailed scheme

of punishments, including monetary punishments characterized simultaneously as "amercements" and "fines," which could be imposed upon conviction of a crime. See *The Laws of the Pilgrims* (J. Cushing ed. 1977) (unnumbered pages).<sup>4</sup> The Colonists' rejection of the notion that a person could be punished without being informed, in advance of engaging in particular conduct, of the maximum potential penalty for such conduct was virtually universal. See 1 B. Schwartz, *The Bill of Rights: A Documentary History* 78 (1980); P. Reinsch, *English Common Law in the Early American Colonies* 53-59 (1977).

In establishing this principle in the Colonies, the Colonists were implementing, as had their English forebears, a precept of ancient lineage going back to the Latin canon, "Nullem crimen, nulla poena, sine lege," the modern translation of which is, "there can be no crime, and no punishment, except as the law prescribes it." M. Frankel, *Criminal Sentences* 3 (1972) (emphasis in original). As noted above, this principle had been thoroughly integrated into the English system under which punitive fines, in the form of amercements, were imposed in civil actions very similar to punitive damage actions of today. See *Solem v. Helm*, 463 U.S. 277, 284-85 (1983).

Acceptance of the concept "nulla poena, sine lege" was manifested in the States by the codification of the criminal law and the rejection of the concept of common law crimes in this country. L. Friedman, A

<sup>4</sup> See *Br. of Golden Rule Insurance Co., et al., as Amici Curiae*, at 21-25.

*History of American Law* 573 (2d ed. 1985).<sup>5</sup> As of the time of the ratification of the Fourteenth Amendment, nearly every State had enacted a comprehensive criminal code that defined punishable crimes and fixed the maximum punishment available. (A compendium of those codes is reprinted in the Appendix hereto *infra*.)<sup>6</sup> Moreover, as illustrated by the Court's recent unanimous decision in *Miller v. Florida*, 482 U.S. 423 (1987), this Court has assumed, at least since its decision in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), that no person could be punished for the commission of an offense deemed "criminal" unless an upper limit on the punishment had been announced prior to the commission of the acts leading to conviction.

This history demonstrates that our legal heritage, and therefore fundamental concepts of proper standards for government-imposed punishments embodied

<sup>5</sup> By the early 19th Century, this Court had rejected the concept of common law crime at the federal level. It declared that prior to prosecution of a federal offense, Congress "must first make an act a crime [and] affix a punishment to it . . ." *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

<sup>6</sup> In enacting such comprehensive penal codes, the States rejected the notion of open-ended, potentially unlimited punishments. The codification of criminal offenses with fixed maximum punishments throughout the States at and around the time of the ratification of the Fourteenth Amendment demonstrates the depth and breadth of the consensus among the several States on this question. See, e.g., Ala. Penal Code chs. 1-10 (1866) (punishing variety of offenses, including forgery, counterfeiting, larceny, embezzlement, murder, robbery, burglary, and arson); see *id.* §§ 91, 92, 101, 102, 104-110, 118, 123, 129, 130, 135, 136, 138, 140, 144, 148, 153-155, 157-159, 162, 177-184, 186-190, 192-207 (imposing maximum fines for a variety of offenses).



within the Excessive Fines Clause, prohibit the imposition of punishment in the absence of pre-established limits on that punishment. And, the complete rejection in this country of the potential for unlimited criminal fines casts grave doubt on the constitutionality of potentially unlimited punitive fines in civil cases. No principled constitutional distinction may be drawn between fines that are imposed to punish and deter on the basis of whether such fines are labeled "criminal" or "civil" or whether they are assessed in criminal or civil proceedings.<sup>7</sup> Constitutional requirements are "not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio*, 382 U.S., at 402.

**C. The Excessive Fines Clause Requires Legislatively Established Limits on the Maximum Punitive Fine Permissible For a Particular Type of Misconduct**

Although petitioners' constitutional challenge to the punitive damage award in this case rests on the Excessive Fines Clause of the Eighth Amendment, that challenge necessarily encompasses concepts commonly thought of in other contexts as due process considerations. For example, the Court has recognized that procedural considerations are inextricably bound up with the Eighth Amendment determination whether imposition of the death penalty is cruel and unusual. Indeed, the Court has gone so far as to state:

<sup>7</sup> See W. Hale, *Handbook on the Law of Damages* §§ 87-88, at 306 (2d ed. 1912) ("It certainly appears to be an incongruity that one may be punished by the public for the crime . . . by a fine limited by statute, and again punished in favor of the sufferer . . . for the same act, by exemplary damages, with little limit but the discretion of the jury.").

In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death . . . .

*California v. Ramos*, 463 U.S. 992, 999 (1983) (emphasis in original); see *id.*, at 999-1000 (discussing *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Furman v. Georgia*, 408 U.S. 238 (1972)). In effect, the Court's death penalty cases stand for the proposition that absent adequate procedural safeguards, imposition of the death penalty is cruel and unusual punishment; that without procedural protections, that form of punishment is not permissible under the Eighth Amendment.

As the preceding historical discussion has shown, procedural considerations are no less a part of the Excessive Fines Clause.<sup>8</sup> Thus, although the right to advance notice of what conduct will be singled out by society for punishment, and of the nature and extent of the punishment that will be imposed for particular conduct, may be analyzed as a due process right, the Eighth Amendment restrictions on excessive or extreme punishments embody similar restrictions. Like the death penalty procedures required by the Cruel and Unusual Punishments Clause, the notice component of the Excessive Fines Clause may be characterized, in the words of one commentator, as

<sup>8</sup> It has long been recognized that various constitutional provisions have important procedural components. See, e.g., Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970).



"eighth amendment due process."<sup>9</sup> Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 283 n.26 (1984). Accordingly, the due process requirement of fair and explicit notice of how and under what circumstances government shall inflict punishment is a more generic component of the more specific protection afforded by the Excessive Fines Clause. Thus, cases decided under the Due Process Clause provide useful guidance on how the Excessive Fines Clause should be applied in this case.

Principles of due process require that persons who are subjected to potentially severe punishment be informed in advance at least of the range of punishment available under the law for any particular conduct. This Court has observed, in the context of classic criminal punishment, that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123 (1979). In the criminal justice system, due process therefore requires that the "range of penalties" be established in advance so as to "inform[] . . . the courts, prosecutors, and defendants of the permissible punishment alternatives

<sup>9</sup> Of course, *Metromedia* does not mean to suggest that the Excessive Fines Clause requires with respect to punitive damages all of the procedural safeguards required by the Cruel and Unusual Punishments Clause with respect to the death penalty. As the Court has often observed, death is a unique form of punishment which may necessitate unique procedural safeguards. Rather, the point is simply that the fair notice component of the Excessive Fines Clause is a form of procedural safeguard analogous to the admittedly distinct and more extensive procedures required by the Cruel and Unusual Punishments Clause in death penalty cases.

available . . . . " *Id.*, at 126. Indeed, it is a basic principle of our criminal law that the government can prosecute a person only under a criminal statute that "fairly and clearly define[s] the conduct made criminal and the punishment which can be administered." *Berra v. United States*, 351 U.S. 131, 139-40 (1956) (Black, J., dissenting); see *Connally*, 269 U.S., at 391 ("That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and settled rules of law.").<sup>10</sup>

It is settled that the notice required by due process protects against unconstitutional deprivations of both liberty and property, *Giaccio*, 382 U.S., at 402, as well as against arbitrary and discriminatory enforcement of the laws and impermissible delegations of "basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis." *Grayned*, 408 U.S., at 108-09; *Papachristou*, 405 U.S., at 170 ("Where . . . there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.").

<sup>10</sup> The due process requirement that a "person of ordinary intelligence" have fair notice as to what the law commands or forbids is equally applicable in civil proceedings. *A.B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 239 (1925) ("It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."). See generally *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

The Court has explicitly recognized that due process is violated if a law is so vague and standardless that jurors have unfettered discretion to determine what conduct is prohibited and the circumstances under which monetary punishment may be imposed. See *Giaccio*, 382 U.S., at 402-03. As stated by Justice O'Connor, joined by Justice Scalia, in her concurring opinion in *Bankers Life and Casualty Co.*, 108 S. Ct., at 1656, the "grant [to a jury] of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." In *Giaccio*, for example, the Court held that a state statute that empowered a jury to impose costs upon an acquitted defendant was in violation of the Due Process Clause. State court interpretations of the statute indicating that a jury could impose costs under such statute if defendant's conduct was "reprehensible in some respect," "improper" or "outrageous to 'morality and justice,'" 382 U.S., at 403-04, did not remedy the deficiencies of the statute because the jury still had "such broad and unlimited power in imposing costs . . . that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is." *Id.*, at 403.

The Court has not yet had an occasion to apply these due process standards to the punitive damage systems flourishing in so many States. But those systems inflict the very same deprivations of property, through the imposition of punishment, by civil juries, as those discussed above, without providing meaningful notice to the defendant of the circumstances that may bring about such deprivations. Regardless of any independent considerations under the Due Process

Clause,<sup>11</sup> it is submitted that punitive damage awards under such systems violate the specific protections against arbitrary, capricious and excessive fines provided by the Excessive Fines Clause.

As noted earlier, punitive damage awards by juries are not determined in accordance with any ascertainable or explicit standards or guidelines, whether legislatively or otherwise established. No such standards or guidelines have been formulated. Indeed, as a member of this Court has observed, "[u]nlike criminal penalties, . . . punitive damages are not awarded within discernible limits but can be awarded in almost any amount . . . . [T]hese damages are the direct product of the ancient theory of unlimited jury discretion . . . . The manner in which unlimited discretion may be exercised is plainly unpredictable." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting); see *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 276 n.3 (1984) (Powell, J., dissenting). Moreover, the social and economic policy decisions involved in determining the amount of punishment necessary to fulfill the objectives of retribution and deterrence are left to be made by the body most ill-suited to make such decisions: the jury.<sup>12</sup> These are precisely the evils that the excessive punishment provisions of

<sup>11</sup> For a discussion of the argument that the Due Process Clause of the Fourteenth Amendment itself prohibits punitive damage awards in the absence of, *inter alia*, legislatively established limits, see Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983).

<sup>12</sup> The Court also has regarded the objectives of punishment—deterrence and retribution—to be relevant in determining whether a punishment comports with the Eighth Amendment. See *infra* footnote 15 and accompanying text.



Magna Carta, the English Bill of Rights of 1689, the Virginia Declaration of Rights of 1776, and the Eighth Amendment sought to eliminate.

In our society, while the judiciary and legislature share responsibility for the oversight of the development of the law of compensation for torts,<sup>13</sup> legislatures are assigned the task of ascertaining the level of society's disapprobation—be it through fine or other punishment—of particular antisocial conduct. Indeed, in this country legislatures customarily establish the maximum and minimum punishments that may be imposed for a specific offense and the trial court exercises its discretion to sentence within that range. See L. Berkson, *The Concept of Cruel and Unusual Punishment* 81-82 (1975); H.L.A. Hart, *Punishment and Responsibility* 15, 164 (1968); see generally J. Bentham, *The Rationale of Punishment* 411-12 (1830).<sup>14</sup>

<sup>13</sup> Although not raised by this case, judicial creation of retroactive liability may raise independent constitutional concerns. See note 2, *supra*.

<sup>14</sup> The only context in which punishment is still administered in our judicial system in the absence of pre-established limits is in connection with the courts' exercise of their inherent contempt power. In *Green v. United States*, 356 U.S. 165 (1958), the Court, while adhering to the historical rule that contempts of court could be tried without a jury, insisted on the "careful use and supervision" of this awesome power and sustained a three-year sentence for willful disobedience of a surrender order as not being excessive because it was "well within" the maximum sentence under the federal criminal statute which punished the closely analogous crime of bail-jumping. Concern for the open-ended nature of the punishments available in contempt situations in those jurisdictions in which no legislatively imposed limits existed ultimately led the Court to interpose a jury in

Not only is this legislative role constitutionally required, but legislatures are better equipped than courts or juries to make the broad social, political and economic judgments necessary to determine the desirable range of punishment. A court "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist," while a legislature "looks to the future and changes existing conditions by making a new rule to be applied thereafter . . . ." *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). As the Court observed in *Gore v. United States*, 357 U.S. 386, 393 (1958), "views . . . regarding severity of punishment . . . are peculiarly questions of legislative policy . . . ." Accord *Rosenberg v. United States*, 346 U.S. 273, 306 (1953) (Frankfurter, J., dissenting) ("Congress not the whim of the prosecutor fixes the sentence").

Moreover, proper fulfillment of the penal objectives of deterrence and retribution, factors deemed relevant by the Court in determining whether a punishment

serious contempts, *Bloom v. Illinois*, 391 U.S. 194 (1968), and to impose various other procedural restrictions on the exercise of the criminal contempt power, e.g., *Taylor v. Hayes*, 418 U.S. 488 (1974). That power is, of course, exercised only sparingly and only under an elaborate set of constitutional constraints fashioned by this Court under the Due Process Clauses of the Fifth and Fourteenth Amendments. Whatever may be said for its continued exercise in the absence of legislatively established limits on punishment, the historic concerns that have moved this Court to tolerate its existence are not present in the punitive damages system. Cf. *Hicks v. Feiock*, 108 S. Ct. 1423, 1437 (1988) (O'Connor, J., dissenting) ("Because the compensatory purpose limits the amount of the fines, the contemnor is not exposed to a risk of punitive sanctions that would make criminal protections necessary.").



comports with the Eighth Amendment,<sup>15</sup> implicitly mandates a legislatively established maximum punishment for a specific offense. With a legislatively established maximum punitive fine, some measure of certainty—at least at the outer extreme—would be established. Certainty is a necessary condition for punishment to achieve its goal of deterrence:

The more completely the scale of punishments is rendered certain, the more completely all members of the community are enabled to know what to expect. It is the fear of punishment in so far as it is known, which prevents the commission of crime. An uncertain punishment will therefore be uncertain in its effects—since, where there is a possibility to escape, escape will be hoped for.

J. Bentham, *The Rationale of Punishment*, *supra*, at 411; see 4 W. Blackstone, *Commentaries on the Laws of England* 16-17 (13th ed. 1800). Indeed, as Blackstone observed, "it must be left to the arbitration of the legislature to inflict such penalties as are war-

<sup>15</sup> For example, in *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2700 (1988) (plurality opinion) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)), the Court held that the imposition of the death penalty for offenses committed by persons under 16 years of age was unconstitutional as it did not serve the objectives of punishment—deterrence and retribution—but rather was "nothing more than the needless imposition of pain and suffering." Whether the present punitive damages system serves or undermines the objectives of punishment, therefore, is pertinent in evaluating the constitutionality of that system under the Eighth Amendment. As discussed in the text, the present punitive damage system clearly undermines both goals of punishment, which is further evidence of its unconstitutionality under the Eighth Amendment.

ranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offenses." 4 W. Blackstone, *supra*, at 12.

Bentham's utilitarian theory of punishment also recognizes that it is the legislature's task to prescribe a range of permissible punishments for a specific offense. Positing that the goal of deterrence requires the punishment to be proportional to the guilt of the offender, Bentham set out six primary rules to guide legislators in demarking the maximum and minimum limits of punishment. Four of those rules mark out the limits of punishment on the minimum side,<sup>16</sup> and the other two rules aid in establishing maximum limits.<sup>17</sup> J. Bentham, *An Introduction to the Principles*

<sup>16</sup> These four rules provide:

Rule 1. "That the value of punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offense . . . ."

Rule 2. "The greater the mischief of the offense, the greater is the expense which it may be worth while to be at, in the way of punishment . . . ."

Rule 3. "Where two offenses come in competition, the punishment for the greater offense must be sufficient to induce a man to prefer the less . . . ."

Rule 4. "The punishment should be adjusted in such manner to each particular offense, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it . . . ."

J. Bentham, *An Introduction to the Principles of Morals and Legislation* 289-93 (C. Wilson & R. McCallum ed. 1945).

<sup>17</sup> These two rules provide that:

Rule 5. "The punishment ought in no case be more than what

of *Morals and Legislation* 289-93 (C. Wilson & R. McCallum ed. 1945); see J. Bentham, *The Rationale of Punishment*, *supra*, at 32-37; E. Pincoffs, *The Rationale of Legal Punishment* 23-24 (1966).

Fulfillment of the objectives of punishment further requires that the appropriate punishment for particular offenses be determined by a complex balancing of the goals of deterrence and retribution against a framework of proportionality and the Eighth Amendment's injunction against excessiveness, a task for which a jury is singularly unsuited and ill-equipped. As Justice Brennan noted in a death penalty case, the Framers provided in the Eighth Amendment the limiting principle of proportionality because the societal purposes of punishment—retribution and deterrence—"possess inadequate self-limiting principles." *Tison v. Arizona*, 107 S. Ct. 1676, 1699-1700 (1987). Proportionality requires that the punishment for a specific offense be consonant with society's judgment regarding the severity of that offense. There must therefore be limits on punishment for each offense lest the punishment for that offense in a particular

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is necessary to bring it into conformity with the rules have given [marking out the limits of punishment on the minimum side] . . . ."

Rule 6. "[T]he quantity actually inflicted on each individual offender may correspond to the quantity intended for similar offenders in general, the several circumstances influencing sensibility ought always to be taken into account."

J. Bentham, *An Introduction to the Principles of Morals and Legislation*, *supra*, at 289-93. While Rule 6 is intended to serve as a guide to the legislator, its principal purpose is as a guide for the judge in his endeavors to conform to the intentions of the legislator. *Id.*

case be more severe than that which society reserves for more serious offenses. Unless given legislative guidance, a jury plainly cannot perform that function. S. Benn, *Punishment*, 7 *Encyclopedia of Philosophy* 32 (1967) (retributive justice demands that the punishment "fit the crime"); J. Bentham, *The Rationale of Punishment*, *supra*, at 32-37 (deterrence will be accomplished only by scaling the expense of punishment to the mischief of the offense); L. Berkson, *supra*, at 66-69; H. Dagge, *Consideration on Criminal Law* 167-71 (1772); H.L.A. Hart, *supra*, at 25 ("the guiding principle is that of proportion within a system of penalties between those imposed for different offenses where these have a distinct place in a common sense scale of gravity"); W. Paley, *The Principles of Moral and Political Philosophy* 273-74 (6th ed. London 1788); E. Pincoffs, *supra*, at 3-5, 23-24; E. van den Haag, *Punishing Criminals* 237 (1975).<sup>18</sup>

In punitive damage cases, a jury performs a primitive approximation of these complex balancing tasks by combining the individual intuitive judgments of its members. But it assesses punitive fines in the total absence of any expertise in what measure of punishment would actually be necessary to achieve deterrence or retribution or any informed sense of what

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<sup>18</sup> As Blackstone observed, ideally

a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least: but if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offenses of an inferior rank.

4 W. Blackstone, *supra*, at 17-18.



society has determined is suitable punishment for other similar, or more or less serious offenses.<sup>19</sup> Remarkably, juries in these cases are asked to perform this Solomonic task in the absence of any legislatively established limits on the punishments they can impose. Furthermore, if defendants have no prior notice as to the range of punishments to which conduct might expose them, it is unlikely that they can be deterred.

To say that the punitive damage system is not designed to produce verdicts that fulfill the retributive and deterrent purposes of punitive damages is an understatement. Parties who seek punitive damages are private prosecutors with a stake in collecting as large a bounty as they can convince juries to impose. The punitive damage system then turns over to the fact-finder responsibility for determining the amount of the bounty based largely on the wealth of the defendant and the degree of hostility that the prosecutor has been able to inspire toward the defendant. The chemistry of combining these two functions is calculated to produce results that bear no visible relationship to the public purposes of punitive awards. See Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev., at 1179 ("Evaluation of past conduct [at the

<sup>19</sup> The Sentencing Reform Act, 28 U.S.C. § 991(b)(1), was enacted, in relevant part, in response to the problems of uncertainty and inconsistency in sentencing resulting from the "unfettered discretion" conferred upon sentencing judges. See S. Rep. No. 225, 98th Cong., 1st Sess. 38-40 (1983). It is more than ironic that civil juries empowered to impose punitive fines possess vastly broader discretion than the "unfettered discretion" conferred upon sentencing judges that Congress sought to eliminate by a more determinate sentencing process.

liability stage of a trial] is a different type of problem from control of future behavior . . . . [P]roblems of social control may require more technical skill than jurors have or can acquire."'). This open incitement to the infliction of severe punishment against a defendant with a deep pocket is built into much of the punitive damage system.

Because today's punitive damage system provides wholly inadequate notice of the standards and the punitive consequences for deviation from those standards that characterize nearly every application of that system, the goals of retribution and deterrence that provide the only rationale for the system are not at all being served. Without sufficient standards to guide its policymaking, a jury exercising its vast discretion to punish does so by legislating and executing its own theory of retribution and deterrence for that particular case. Once a jury has acted, the judiciary, without much-needed guidance from the Constitution, and understanding that it is as ill-suited as the jury to make the kind of political, social and economic judgments that ought to go into the development of any fair and efficient system of punishment, makes little effort to substitute its *ad hoc* judgments for those of juries. This judicial abstinence is often based upon the mere assumption that plaintiffs are constitutionally entitled to have a jury assess the amount of damages in cases in which the Constitution otherwise guarantees a jury trial on the issue of liability. This assumption, while never wholly tenable, is now clearly misdirected in light of this Court's recent decision in *Tull v. United States*, 107 S. Ct. 1831 (1987). Thus, the courts have left to juries their *ad hoc* determinations of retribution and deterrence, and during this process, the one po-



litical institution in our system capable of treating the social, political and economic issues involved in determining the appropriate scale of punishments—the legislature—has collectively declined to establish the necessary foundation for this aberrational and mischievous system.<sup>20</sup>

Under this “system,” each punitive damage case becomes a laboratory for social engineering in which the jury formulates and applies its own, unique theory of punishment and deterrence and then disbands. This system carries with it no pretense of trying to achieve coherent, rational results. Instead, it is unavoidable that it will produce bizarre and unpredictable results because there are no overarching rules to govern its performance. The Excessive Fines Clause, properly applied, provides such a rule.

Until such time as the state legislatures prescribe a scale of maximum punishments in the form of pu-

<sup>20</sup> In recognition of the undesirability, if not irrationality, involved in a system of punishment that places in the hands of each jury the power to decree the punishment to be imposed in criminal cases, the American Bar Association has taken the position that, except in death penalty cases, juries should not be given the responsibility for imposing punishment in criminal cases. See ABA Standards for Criminal Justice, Standard 18-1.1 (2d ed. 1980). In addressing this issue, the ABA has pointed out that “a proper sentencing decision calls on an expertise which a jury cannot possibly be expected to bring with it to trial, nor develop the one occasion on which it will be used.” *Id.*, Commentary, at 18.16 (quoting ABA, Sentencing Alternatives and Procedures, Commentary, at 46 (1968)). Commentators have similarly urged that judges, not juries, should determine punitive damage liability. See, e.g., Sugarman, *Serious Tort Law Reform*, 24 San Diego L. Rev. 795, 830 (1987); Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 Ky. L.J. 1, 96 (1985-86).

nitive fines for specific types of conduct, the Excessive Fines Clause prohibits the imposition of *ad hoc* punishment by unconstrained juries in the form of punitive damage awards for such conduct. If juries or judges in criminal cases were permitted to establish *post hoc* the maximum possible punishment in each case, the Ex Post Facto Clause, Art. I, § 10, cl. 1, would be emasculated as it applies to criminal sentencing. See, e.g., *Miller v. Florida*, 482 U.S. 423 (1987). No difference of constitutional dimension exists between fines imposed after a criminal trial to punish and deter and punitive damage awards imposed after a civil trial to accomplish the same purposes.

## CONCLUSION

This case presents an unconstitutional exercise of unlimited power by a civil jury to determine after the fact how much punishment to inflict to serve society's objectives of retribution and deterrence. This standardless, and by its nature excessive, power exercised by civil juries is inconsistent with the requirements of the Excessive Fines Clause of the Eighth Amendment. Requiring legislatively prescribed maximum punitive fines for particular conduct before a punitive fine can be imposed for that conduct, thereby providing constitutionally required notice to prospective defendants, will enable the retributive and deterrent objectives of society to be achieved in a constitutional, rational and effective framework.

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**APPENDIX**

## APPENDIX

At the time of ratification of the Fourteenth Amendment, most States had enacted comprehensive codifications describing the conduct which could be subjected to punishment and the maximum punishment that could be administered. *See* Ark. Stat. ch. 42 (1874) (general codification of crimes); *see id.* at §§ 1357, 1364, 1381, 1386, 1388 (imposing maximum fines for a variety of offenses); *see* Cal. Stat. ch. 99 (1850) (general codification of crimes); *see id.* ch. 99 §§ 61, 63, 69, 86, 87; *see* Conn. Gen. Stat. tit. 12 (1866) (general codification of crimes); *see id.* §§ 90-92, 160-166, 180-181 (imposing maximum fines for a variety of offenses); *see* Del. Rev. Stat. chs. 126-133 (1852) (general codification of crimes); *see id.* ch. 128, §§ 3-6, 8-19, ch. 129, §§ 1-5 ch. 130, §§ 1-5, (imposing maximum fines for a variety of offenses); *see* Fla. Stat. chs. 42-56 (1872) (general codification of crimes); *see id.*, ch. 44 §§ 5, 9, 17, 18, 49, ch. 45 § 6, 8, 9; *see* Ga. Code §§ 4286-4336 (1861) (general codification of crimes); *see id.* §§ 4332, 4468, 4470, 4480, 4482 (imposing maximum fines for a variety of offenses); *see* Digest of the Crim. Laws of Ill. (1868) (general codification of crimes); *see id.* division 7 §§ 86, 91, 95, 100, division 8 § 119; *see* Ind. Stat. chs. 6-7 (1862) (general codification of crimes); *see id.* ch. 6 §§ 36, 37, 39, 43, 46; *see* Iowa Code tit. 24 (1873) (general codification of crimes); *see id.* ch. 3 §§ 3885-3886, 3889-3890, 3898 (imposing maximum fines for a variety of offenses); *see* Kan. Gen. Stat. ch. 31 (1876) (general codification of crimes); *see id.* ch. 31 §§ 80, 109, 113, 146 (imposing maximum fines for a variety of offenses); *see* Ky. Rev. Stat. Ann. ch. 28, arts. 1-26 (1867) (punishing full range of offenses, including



offenses against the person, forgery, larceny, embezzlement, and trespass); *see id.* ch. 28, art. 14 § 6, art. 15 §§ 4, 7, art. 16 §§ 2, 5, art. 17 §§ 1-2, 6-8, 10, 12-20, 22-25, art. 18 §§ 4-5, art. 19 §§ 1-3, art. 20 § 2, art. 21 §§ 1-5, art. 22 § 3, art. 23 §§ 1-3; art. 24 §§ 2, 5, art. 25 §§ 2-5, 7-10 (imposing maximum fines for a variety of offenses); *see* La. Rev. Stat. §§ 784-975 (1870) (general codification of crimes); *see id.* §§ 811, 815-819, 821-822, 824-826 (imposing maximum fines for a variety of offenses); *see* Me. Rev. Stat. chs. 117-139 (1871) (general codification of crimes); *see id.* ch. 120 §§ 1-4, 6, 8, ch. 121 §§ 3, 6 (imposing maximum fines for a variety of offenses); *see* Md. Code art. 30 (1860) (general codification of crimes); *see id.* art. 30 §§ 19-20, 34, 38; *see* Mass. Gen. Stat. chs. 161-164 (1860) (general codification of crimes); *see id.* ch. 161 §§ 43, 44, 46, 48, 54-56, 91 (imposing maximum fines for a variety of offenses); *see* Minn. Stat. ch. 54 (1873) (general codification of crimes); *see id.* tit. 4 §§ 82, 84, 87, 96-97, 102-103, 105 (imposing maximum fines for a variety of offenses); *see* Miss. Rev. Code ch. 58 (1871) (general codification of crimes); *see id.* §§ 2547, 2569, 2597, 2653, 2656-2657 (imposing maximum fines for a variety of offenses); *see* Mo. Stat. ch. 42 (1870) (general codification of crimes); *see id.* art. 3 §§ 27, 31, 59, 65-66, 68-69 (imposing maximum fines for a variety of offenses); *see* Nev. Laws ch. 54 (1873) (general codification of crimes); *see id.* §§ 2368-2369, 2379, 2386-2387 (imposing maximum fines for a variety of offenses); *see* N.H. Gen. Laws chs. 269-284 (1878) (general codification of crimes); *see id.* ch. 275 §§ 1-4, 7, 8, 10, 11 (imposing maximum fines for a variety of offenses); *see* N.Y. Stat., ch. 1, tits. 1-7 (1869) (general codification of crimes); *see id.* ch. 1, tit. 3 §§ 69, 71,

ch. 1, tit. 4 §§ 9-13 (imposing maximum fines for a variety of offenses); *see* N.C. Rev. Code. ch. 34 (1855) (general codification of crimes); *see id.* ch. 34 §§ 49, 65, 68-70, 83-88, 91-92 (imposing maximum fines for a variety of offenses); *see* Ohio Crim. Code (1878) (general codification of crimes); *see id.* ch. 3 §§ 6-7, 16, 20, 22 (imposing maximum fines for a variety of offenses); *see* Or. Stat. chs. 3-12 (1855) (general codification of crimes); *see id.* ch. 4 §§ 12-13, 16-17, 31-32, 34-40 (imposing maximum fines for a variety of offenses); *see* Pa. Rev. Penal Code (1860) (general codification of crimes); *see id.* §§ 100-106, 111-112, 119-121, 125-130, 134, 155-162, 164-165 (imposing maximum fines for a variety of offenses); *see* R.I. Stat. tit. 30 (1857) (general codification of crimes); *see id.* tit. 30, ch. 214 §§ 10, 14, 16-20, 22, 24-28 (imposing maximum fines for a variety of offenses); *see* S.C. Rev. Stat. tit. 2 (1894) (general codification of crimes); *see id.* §§ 276-282, 288-295 (imposing maximum fines for a variety of offenses); *see* Tex. Laws arts. 355-572 (1850) (general codification of crimes); *see id.* arts. 380-382, 386, 389, 391, 393 (imposing maximum fines for a variety of offenses); *see* Vt. Stat. tit. 38 (1851) (general codification of crimes); *see id.* ch. 104 §§ 2-10, 15, 19-22, 26-28 (imposing maximum fines for a variety of offenses); *see* Va. Code tit. 54 (1860) (general codification of crimes); *see id.* ch. 192 §§ 18, 24, 27, 30, 32; *see* W.Va. Code chs. 143-152 (1870) (general codification of crimes); *see id.* ch. 144 §§ 9-11, ch. 145 §§ 5-8, 23 (imposing maximum fines for a variety of offenses); *see* Wis. Stat. tit. 27 (1871) (general codification of crimes); *see id.* ch. 164 §§ 23, 29, 31-32, 38, 42, 45, ch. 165 §§ 16-18, 23 (imposing maximum fines for a variety of offenses).

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**BRIEF OF THE GOODYEAR TIRE &  
RUBBER COMPANY AS AMICUS CURIAE  
IN SUPPORT OF THE PETITIONERS**

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**INTEREST OF THE AMICUS CURIAE**

*Amicus curiae*, The Goodyear Tire & Rubber Company ("Goodyear"), manufactures, distributes and sells products and services necessary to the operation, maintenance and repair of vehicles. In a case presently on this Court's docket, Goodyear seeks review of a decision of the Supreme Court of Minnesota in which that court announced a new substantive legal standard of conduct and imposed on Goodyear a \$4,000,000 punitive damage assessment for having deviated from that standard in connection with an accident that had occurred seven years earlier. *The Goodyear Tire & Rubber Co. v. Hodder*, No. 88-626, petition for cert. filed, Oct. 14, 1988, stay granted, Oct. 24, 1988 (O'Connor, Circuit Justice) (A-296).

The product that led to the injury in the *Goodyear* case had been manufactured and sold twenty-five years prior to the accident. It was neither defectively designed nor manufactured and was found by the jury to have outlived its useful life. Goodyear's liability was predicated on the theory that it had, in 1981, breached a continuous post-sale legal duty to warn potential users of its product that misuse of the product could cause injury, a theory that had not been submitted to the jury. The jury's compensatory damage verdict was for \$3,368,916.

On appeal, the Supreme Court of Minnesota upheld Goodyear's liability for compensatory damages in the amount determined by the jury. However, it set aside the jury's punitive damage award as having been based upon

an improper legal theory. It reviewed the record and imposed, *de novo*, a \$4,000,000 punitive damage award. In determining an appropriate punitive damage award, the court purported to apply a statute, *Minn. Stat.* § 549.20(3), under which a variety of subjective factors are to be considered in assessing the size of a punitive damage award. Those factors do not, on the face of that statute, include proportionality between the compensatory award and the ultimate punitive award.

In the case now before the Court, a Vermont jury awarded respondents approximately \$51,000 in compensatory damages and \$6,000,000 in punitive damages under a state common law tort theory. Petitioners pointed out in their petition for certiorari that this punishment, well over 100 times greater than the actual damages assessed, "greatly exceeded the harm done" to the respondents. As Goodyear shall demonstrate below, the courts of many jurisdictions have adopted as one of several legal standards for determining the propriety, under state law, of the size of a punitive damage award a test that looks to the relationship or proportionality between punitive and compensatory awards in the same case. As Goodyear shall show, there is no constitutional basis for looking to the relationship between the punitive and compensatory awards in a case, and a test based upon such a relationship would not rationally serve the goals of retribution and deterrence underlying punitive damage theory. Rather, the proportionality calculation has been employed by courts where its application yielded results those courts regarded as felicitous and has been as readily ignored by the same courts when its application proved infelicitous. Goodyear submits that the facts of its case presently before the Court enable it to articulate the reasons why the Court should reject the "reasonable relationship" test and adopt a more rational, reliable and consistent standard for determining excessiveness under the Excessive Fines Clause of the Eighth Amendment.

## SUMMARY OF ARGUMENT

A punitive damage award will generally not be constitutionally "excessive" if the jurisdiction in which the award has been imposed has enacted a statute setting forth the maximum possible fine for clearly defined conduct that will result in punitive damages and the award does not exceed that maximum. That process would be expected to produce fair, relatively uniform and predictable results, would be supported by the practice observed under the lineal antecedents of the Excessive Fines Clause, would be consistent with and implement the theory of punitive damages, and would leave the legislatures of the several States ample leeway to adjust their penalty schemes upward or downward if experience under such a regime yields unsatisfactory results.

Of course, as this Court held in *Solem v. Helm*, 463 U.S. 277 (1983), even punishment authorized by statute may be so disproportionate as to be constitutionally excessive. Under the criteria articulated in *Solem*, a court considering the excessiveness of a punishment including a punitive damage award should also examine whether a statutory punishment scheme is compatible with the punishment prescribed by that State and other States for similar offenses.

A number of courts have employed, as a means of determining the excessiveness of punitive damages as a matter of state law, the requirement that a punitive damage award must bear some loosely defined "reasonable relationship" to the compensatory damage award in a particular case. Although this test appears, superficially, to provide a convenient and simple means of controlling the size of punitive awards, the "reasonable relationship" test must be rejected for any one of several reasons. First, that test is ill-conceived as a matter of theory because the size of a compensatory damage award—which attempts to measure harm to the plaintiff—bears no necessary or log-

ical relationship to the level of punishment appropriate to secure society's interest in retribution and deterrence.

Second, the "reasonable relationship" test should be rejected because it cannot provide a rule of decision suitable for all, or even most, punitive damage cases. Its use as a state law rule has appropriately been abandoned in cases in which the compensatory damages have been very small notwithstanding the danger to society posed by the type of misconduct involved. Similarly, its use in cases, such as *Goodyear*, in which the conduct at issue was fully legal at the time it was "committed," but which led to severe injury to a plaintiff and a large compensatory damage award, would be equally absurd.

Third, the "reasonable relationship" test would in fact provide no meaningful control over the excessiveness of punitive damage awards because the sizes of compensatory damage awards themselves are within the almost absolute discretion of juries and are themselves subject to virtually no judicial supervision. Multiplication of such an uncertain, volatile number as a means of introducing fairness and certainty into the punitive damage system would be both nonsensical and inconsistent with the proper interpretation of the Excessive Fines Clause.

#### ARGUMENT

##### I

#### CONSTITUTIONAL EXCESSIVENESS UNDER THE EIGHTH AMENDMENT SHOULD BE MEASURED BY COMPARING THE PUNITIVE DAMAGE AWARD WITH THE PENALTY PRESCRIBED BY THE LEGISLATURE FOR THE SAME CONDUCT

If the Court decides that the Excessive Fines Clause of the Eighth Amendment applies to punitive damage awards, then the Court will presumably also fashion a standard by which constitutional excessiveness may be determined. Ascertaining constitutional excessiveness by comparing a par-

ticular punitive damage award to the maximum monetary fine established by the pertinent jurisdiction for engaging in the kind of conduct that gave rise to the award provides a principled, objective and practicable standard for measuring constitutional excessiveness.

#### A. Punitive Damage Awards Are Constitutionally Excessive If They Exceed Punishments Imposed by the Legislature for the Underlying Conduct

In *Solem v. Helm*, 463 U.S. 277 (1983), the Court recognized for the first time that the Cruel and Unusual Punishments Clause of the Eighth Amendment incorporated the concept of proportionality with respect to incarceration that was said to have been contained in the parallel provision of the English Bill of Rights of 1689. In reaching this conclusion, the *Solem* Court not only acknowledged, but also placed great reliance on, the historical role of the Excessive Fines Clause and its English and early American antecedents.

The Court's opinion began with the observation that, "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." 463 U.S., at 284. In support, the Court pointed to the fact that three chapters of Magna Carta—the direct historical antecedents of the Excessive Fines Clause—"were devoted to the rule that 'amerce-ments' may not be excessive," *id.*, noting that "[a]n amercement was similar to a modern-day fine," and that "[i]t was the most common criminal sanction in 13th-century England." *Id.*, at 284 n.8. According to the Court, "[t]hese were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments." *Id.*, at 285. The Court observed that the proportionality limitation was carried forward in a provision of the English Bill of Rights of 1689, which was later "adopted verbatim" in the Virginia Declaration of Rights



of 1776, which in turn was the direct basis for the Eighth Amendment. *See id.*, at 285 & n.10.

That excessive *fin*es, or amercements, were subject to these historical limitations was not the subject of dispute between the majority and the dissenters in *Solem*. Rather, the Court split over the *Solem* majority's conclusion that these historical limitations applied to incarceration as well as fines. According to the *Solem* majority: "When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional." 462 U.S., at 285. Thus, the majority held that the Eighth Amendment contains not only the right to be free from excessive fines, but also a more generalized "right to be free from excessive *punishments*." *Id.*, at 286 (emphasis added). It is not necessary for the Court to revisit the question upon which it split in *Solem* in order to decide the case at bar. Rather, all the Court must do is hold that which is explicitly assumed in *Solem*—that the Eighth Amendment places limits on the imposition of excessive punitive fines.

As the brief of Golden Rule Insurance Company, *et al.*, as *amici curiae* demonstrates, the Excessive Fines Clause of the Eighth Amendment and its antecedents in the Virginia Declaration of Rights, the English Bill of Rights, and Magna Carta should, consistently with practice under them, be applied to control the excessiveness of punitive damage awards. The history of these provisions, read in light of the decision in *Solem*, points to the appropriate standard for judging whether a punitive damage award is "excessive" under the Excessive Fines Clause: if a punitive damage award exceeds the maximum punishment imposed by the legislature for the underlying conduct, it is constitutionally excessive. This proposed standard, with the other standards articulated in *Solem*, would faithfully implement the language and evident purpose of the Excessive Fines Clause and would leave the legislatures substantial discretion to set appropriate limits on the availability of punitive

damages for all conduct deemed suitable for the infliction of punishment.

1. *The History of the Antecedents of the Excessive Fines Clause Supports the Reference to Existing Statutory Fines as a Basis for Determining Excessiveness of a Punitive Damage Award*

Under Magna Carta, pre-established limits on amercements—the antecedents of punitive damage awards—were established by custom, local rule or statute and were ascertained by the justices of the court before the jury or its ancient equivalent determined the actual amercement to be imposed. *See* J. Holt, *Magna Carta* 50, 230-231 (1965); W. McKechnie, *Magna Carta* 298 (2d ed. 1958); F. Thompson, *Magna Carta: Its Role In The Making of the English Constitution 1300-1629*, 361 (1948). In this way, the party to be amerced was given notice of the maximum penalty for a given offense and could be punished only up to that limit. Once it was determined that a person should be amerced, a group of peers of that person were charged with deciding whether the maximum available amercement or a lesser sum—or no amercement at all—should be assessed. *Br. of Golden Rule Insurance Company, et al.*, at 10-14. Thus, the "jury" brought its broad and literally merciful discretion to bear within pre-set limits.

Magna Carta worked a substantial reform of the previous state of affairs in which parties subject to amercement were literally at the mercy of the Crown, frequently resulting in arbitrary and excessively harsh punishment. This reform was carried forward in Article 10 of the English Declaration of Rights of 1689, and then enacted in the Bill of Rights of 1689, in language much like that adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 Wm. & Mary, sess. 2, ch. 2 (1689). The drafters of this provision "wanted to prohibit punishments that were unauthorized by statute." L. Schworer, *The Declaration of Rights, 1689*, 93-94 (1981).

The principle that fines could not be imposed without pre-existing statutory sanction was thus well-established by the time the Virginia Declaration of Rights of 1776 adopted verbatim the applicable provisions of the English Bill of Rights. And, as the Court observed in *Solem*, "[t]he Eighth Amendment was based directly on Art. I, § 9, of the Virginia Declaration of Rights (1776), authored by George Mason." 463 U.S., at 285 n.10. According to the Court: "Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments." *Id.*, at 286.

Although it is possible to disagree—as members of the Court did in *Solem*—about whether the protection provided by the English Bill of Rights included the right to be free from excessive incarceration, the historical evidence is overwhelming that the amercements clauses of Magna Carta and their counterpart in the English Bill of Rights—the Excessive Fines Clause—precluded the imposition of fines in the absence of, or in excess of, pre-existing limits. Thus, the historical basis for applying the proportionality requirement of the Excessive Fines Clause of the Eighth Amendment to punitive damage awards is much more substantial than was true of the Cruel and Unusual Punishments Clause involved in *Solem*.

The standard proposed by Goodyear is clearly derived from, if not mandated by, this historical evidence.<sup>1</sup> More-

<sup>1</sup> The only difference between the standard Goodyear proposes and the practice under Magna Carta is that the pre-established limits on amercements could be established by either custom, local rule or statute. It appears that over time, however, statutory rather than common law determination of those limits became the prevailing practice. See *Br. of Golden Rule Insurance Company, et al.*, at 10-16. Just as States may no longer constitutionally create common law crimes, cf. *Bowie v.*

over, it provides a principled and objective approach that would be convenient to administer. Under the proposed test, the question whether an award is constitutionally excessive generally can be resolved by determining whether the State in which the damages were awarded has established a statutory maximum fine for the conduct in question, and, if so, whether the award exceeds that maximum. If the State has not enacted a statutory maximum, then the award of any punitive damages is constitutionally "excessive." If the history of Magna Carta and the English Bill of Rights means anything, it means this much. Otherwise, the reforms introduced by those documents—fair notice to defendants of the extent of their punitive exposure and prevention of arbitrary and excessively harsh penalties—would be read out of the law.

Although many States may not presently have statutes prescribing the maximum punitive awards recoverable for various types of conduct,<sup>2</sup> the standard proposed leaves the States substantially free to adopt, or revise, statutes setting such maximum fines for any conduct it chooses. Thus, legislatures rather than juries would make the complex and often subjective judgments about the proper level of punishment for specific conduct. Not only are legisla-

*City of Columbia*, 378 U.S. 347 (1964), States should not be permitted to establish the required limits on punitive damages by means other than statute. Indeed, any other conclusion would be inconsistent with the principle that "views . . . regarding severity of punishment . . . are peculiarly questions of legislative policy." *Gore v. United States*, 357 U.S. 286, 393 (1958) (Frankfurter, J.).

<sup>2</sup> Ascertaining whether a State has enacted a statute setting forth the maximum fine for a particular type of conduct will require a comparison of the similarity between the conduct for which the State has established a maximum fine and the conduct underlying the award of punitive damages. The two probably need not be identical so long as the statute in question fulfills the function of the Excessive Fines Clause by giving fair notice of the maximum exposure and thereby precluding surprise.



tures required to perform this task under the Excessive Fines Clause, but they are also best suited to perform it.<sup>3</sup>

**B. By Analogy to *Solem v. Helm*, Punitive Damage Awards Within Statutory Limits May Also Be So Disproportionate as To Be Constitutionally Excessive.**

If the Court adopts the standard advanced in this brief, it need not decide in this case whether a punitive damage award within a pre-existing statutory limit could ever be considered "excessive" under the Excessive Fines Clause. Vermont has never legislatively authorized any punitive fine comparable in magnitude to the punitive damage award in this case. Nevertheless, the possibility that some

<sup>3</sup> It might be argued, in the case at bar and in other cases, that the application of this test would yield punishment that was not sufficiently harsh. For example, in *The Goodyear Tire & Rubber Co. v. Hodder*, No. 88-626, the application of this test would result in a financial penalty (in addition to complete compensation in the form of a compensatory damage award of \$3.4 million) of several thousand dollars. See *Petition for Cert. of Goodyear*, at 23. To argue that this penalty is too low, however, is to quarrel with Minnesota's legislature. That body is the most capable of making judgments on behalf of the citizens of Minnesota as to the level of fine necessary to fulfill the public's interest in retribution and deterrence where, for example, a defendant has engaged in deceptive practices in connection with the sale of merchandise. *Id.* Until such time as Minnesota's legislature (or Vermont's) acts to revise that judgment, it is the punitive damage award of \$4,000,000 imposed by Minnesota's judiciary, not the existing judgment of Minnesota's legislature, that must be regarded as constitutionally unacceptable.

Moreover, it must be remembered that the practical impact of the adoption of Goodyear's proposed test would not be to deny successful plaintiffs any recovery to which they are "entitled" in any constitutional sense. The plaintiff in the Goodyear case has already received \$3.4 million in full compensation for his injuries. And, it is universally accepted, as articulated by the Supreme Court of Minnesota, that "punitive damages do not 'belong' to the plaintiff in the same sense as compensatory damages." *Petition for Cert. App.* 20a, 426 N.W.2d, at 837.

States might authorize maximum fines of that magnitude in the future requires Goodyear to address that possibility.

A challenge to a punitive damage award within a pre-existing, ascertainable statutory maximum would require the Court—in the context of punitive fines and the Excessive Fines Clause—to examine an issue over which it split in *Solem*. That issue is whether a legislatively authorized punishment can be so disproportionate as to be constitutionally excessive, and therefore invalid, under the Eighth Amendment.

By analogy to *Solem v. Helm*, the Excessive Fines Clause should be held to require more of the States than simply the provision of fair notice of the maximum punishment that may be inflicted for particular conduct. That Clause requires that a punitive fine be proportional to the offense. Thus, under certain circumstances that Clause may have to be applied to strike down a punitive damage award that is within a statutorily prescribed maximum.

If, for example, a statute expressly authorized punitive fines of up to \$20,000,000 in all punitive damage cases without purporting to discriminate among the vastly different types of conduct that could be penalized under that "limit," the statute would not provide fair notice to persons potentially punishable under it. That statute would also almost assuredly violate the proportionality requirement of the Excessive Fines Clause under most circumstances because the \$20,000,000 potential punishment would undoubtedly be exponentially greater than other monetary punishments inflicted within any jurisdiction in this country, either civilly or criminally, for similar or indeed more heinous conduct.

By a parity of reasoning, a punitive damage award imposed pursuant to that statute might also violate the proportionality requirement of the Excessive Fines Clause if it were in excess of the maximum fines imposed within that jurisdiction for *similar* conduct. Reference to punish-



ments imposed for similar misconduct involves application of the second prong of the three-prong test articulated by the Court in *Solem v. Helm*. There, the Court recognized three bases upon which the constitutional proportionality of a sentence of incarceration might be judged:

(1) the harshness of the punishment relative to the gravity of the offense; (2) the relationship between the sentence imposed and sentences prescribed within the sentencing jurisdiction for similar offenses; and (3) the relationship between the sentence imposed and sentences prescribed for similar offenses in other jurisdictions.

463 U.S., at 292. The second prong of the *Solem* test is based upon the principle that by establishing maximum fines for specific types of misconduct, a legislature "implicitly state[s] its views on the size of monetary penalties it deem[s] sufficient to achieve both punishment and deterrence" with respect to similar offenses. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 283 n.13 (1984) (Powell, J., dissenting). Once a legislature has rendered such a judgment, the second prong of the *Solem* test requires that the legislature, within certain bounds, consistently apply that judgment to similar misconduct unless the legislature revises that judgment.

Although unlikely, it is possible that one or both of the other two prongs of the *Solem* test might come into play. Where, for example, a state legislature had authorized an enormous punitive damage award for conduct deemed in-offensive by virtually all other States, it is possible that the third prong of *Solem* might be invoked to find that punishment excessive.<sup>4</sup>

<sup>4</sup> The occasion to involve the third prong of the *Solem* test in this context would probably be rare. The application of *Solem*'s second prong would eliminate punishments that were disproportionate to other punishments imposed by that jurisdiction for similar conduct. Thus, the

In sum, Goodyear submits that a test of proportionality based upon reference to existing legislative judgments should be adopted by the Court as a means of applying the protections of the Excessive Fines Clause to defendants in punitive damage cases. This test is supported by history and precedent, and would go far to remedy the central evil of the punitive damage system—the empowering of juries to legislate and implement their own theories of retribution and deterrence on an *ad hoc* basis in every punitive damage case—without unduly restricting the power of the state legislatures to adjust their punitive systems to reflect the values of their constituents.<sup>5</sup>

## II

### THE RELATIONSHIP OR RATIO BETWEEN PUNITIVE AND COMPENSATORY DAMAGES PROVIDES NO PRINCIPLED BASIS FOR DETERMINING THE CONSTITUTIONAL EXCESSIVENESS OF PUNITIVE DAMAGE AWARDS

A number of lower courts have measured the excessiveness of punitive damage awards, as a matter of state law, by their proportionality to compensatory awards. However, whether a punitive damage award bears some

third prong would apparently come into play only in the unlikely event that a State's entire punishment structure was so extraordinarily severe that it created a very broad Eighth Amendment problem.

<sup>5</sup> In its petition, Browning-Ferris suggests the possibility that comparing the punitive damage award in its case to other punitive damage awards entered in totally dissimilar cases in Vermont might be a relevant criterion in determining constitutional excessiveness. That suggestion, however, implicitly assumes that juries may be regarded as competent to formulate and implement a rational system of punishment on an *ad hoc* basis under the rules presently applicable to these cases. Such an assumption might have some plausible basis if juries in Vermont punitive damage cases (or in other jurisdictions) operated within the constraints of legislatively fixed limits on punitive damage awards. That is, of course, not the case.

"reasonable relationship" to a compensatory damage verdict is not a constitutionally relevant consideration under the Eighth Amendment. Indeed, nothing in the history or logic of the proportionality requirement of the Excessive Fines Clause supports such a test. If adopted, it would lead to totally arbitrary results and would fail to advance the express purposes underlying the imposition of a punishment for the public-wrong component of an antisocial act.

**A. Neither the History of, nor the Logic Behind, the Excessive Fines Clause Supports a Test of Excessiveness Based upon the Relationship Between Compensatory and Punitive Damages**

Nothing in the history of the prohibition on excessive fines contained in the lineal antecedents of the Excessive Fines Clause suggests that those precursors were concerned with ensuring a "reasonable relationship" between the reparative and punitive components of the total award of damages.<sup>6</sup> See *Br. of Golden Rule Insurance Company, et al.*, at 16 & n.25. In fact, what the history of those provisions establishes is that punitive damages, in the form of amercements, were initially set by the English courts

<sup>6</sup> Indeed, the early English cases make clear that, to the extent that amercements must have been "reasonably related" or "proportionate" to any factor, it was to "the wrong done to the lord or the court, and not the other party to litigation . . ." S. Milsom, *Legal Introduction to Nova Narrationes* in 80 *Selden Society cci* (E. Shanks ed.) (footnote omitted) (relying on A. Fitzherbert, *Natura Brevium* f. 75E (6th ed. 1718)). Fitzherbert made this point very strongly, stating that the

Amercement shall not be unto the Value of the Damages which is done unto the [wronged person], but having Regard unto the Wrong and Offense done unto the Lord for the Wrongs done unto his [wronged person].

A. Fitzherbert, *Natura Brevium*, 168 (f. 75), quoted in F. Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300-1629*, 45 (1948).

based upon the nature of the offense. As Volumes 3 and 4 of Blackstone's Commentaries make clear, antisocial conduct was perceived as either a private wrong or a public wrong. Where conduct contained elements of each, compensation reimbursed the private wrong while a fine or amercement redressed the public wrong. Thus the public injury, not the private injury, was the relevant standard for evaluating the amount of the punishment. Further, limits on the punishment were frequently derived in advance from local ordinances, statutes or custom, and, as so limited, sums were finally assessed in full or lowered by "juries" who were not even necessarily informed of the amount of damages, if any, awarded to the opposing litigant. See *Br. of Golden Rule Insurance Company, et al.*, at 10-11.

This history is but a reflection of the logic of, and justification for, the imposition of punitive awards in civil cases both pre-Magna Carta and today. Compensatory damages are assessed in order to make an aggrieved litigant whole—to restore a wronged person to the position he or she would have been in but for the wrong at issue. Punitive damages and amercements are and were imposed for a very completely different reason—to punish the wrongdoer for the injury done to the public by his misconduct and to deter him and others from future similar wrongdoing. The common law assumed such fines were desirable "on the ground that every evil deed inflicts a wrong on society in general, as well as upon its victim." W. McKechnie, *Magna Carta* 285 (2d ed. 1958). In short, punitive damages fulfill a punitive, public purpose bearing no necessary or logical relationship to the monetary measure of the injury that may have resulted from the private wrong.

The purposes and history of punitive damages thus suggest that their size should be based upon "the enormity of defendant's conduct and the amount necessary to deter defendant and others." Ellis, *Punitive Damages in Iowa*



*Law: A Critical Assessment*, 66 Iowa L. Rev. 1003, 1059 (1981) (hereinafter "Ellis, *Critical Assessment*"). Because particularly reprehensible acts may fortuitously result in negligible compensatory damages, requiring a relationship between punitive and compensatory awards may "thwart completely the purpose of punitive damages." Comment, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 Pac. L.J. 823, 840 (1978) (hereinafter "Comment, *Frustration of Purpose*"). In Professor Morris' classic example, "the grossly negligent hunter may shoot into a crowd of people and only break a ten-dollar pair of glasses." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1181 (1931). If the punitive damage award in such a case must be "reasonably proportioned" to the actual damages, then the hunter will be neither punished nor deterred. *Id.*

On the other hand, where the compensatory damages are large, "punitive damages in a large amount may be uncalled for, even though defendant's conduct was aggravated, since the size of the compensatory damage award may itself adequately serve the deterrence function, and 'sting' the defendant sufficiently to serve the retributive function." Ellis, *Critical Assessment*, 66 Iowa L. Rev., at 1060.<sup>7</sup> The "reasonable relationship" requirement thus "fails to carry out the punitive function of exemplary damages, since it stresses the harm which actually results rather than the social undesirability of the defendant's behavior." Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 531 (1957).

Perhaps because it attempts to mix apples and oranges, the "reasonable relationship" or "reasonably proportionate" requirement is not accepted by a substantial number

<sup>7</sup> See also Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev., at 1182.

of jurisdictions<sup>8</sup>, including Vermont<sup>9</sup>, and has been rejected by the majority of commentators who have addressed the subject.<sup>10</sup> The relationship requirement has been variously condemned as "unnecessary and ineffective;"<sup>11</sup> "artificial" and "meaningless;"<sup>12</sup> an "empty requirement;"<sup>13</sup> a "feeble attempt to provide a guideline;"<sup>14</sup> and "more often a rationalization of results than a means of obtaining them."<sup>15</sup>

That the "reasonable relationship" test is nothing more than a juridical artifice employed to explain the result reached in a particular case is amply demonstrated not only by the wide range of "relationships" sustained in differing jurisdictions purportedly applying that test,<sup>16</sup> but

<sup>8</sup> See, e.g., *Star Credit Corp. v. Ingram*, 75 Misc. 2d 299, 347 N.Y.S.2d 651 (1973); *D.C. Transit Systems, Inc. v. Brooks*, 264 Md. 578, 287 A.2d 251 (1972); *U-Haul Co. of Alabama v. Long*, 382 So. 2d 545 (Ala. 1980); *Lassitter v. International Union of Operating Engineers*, 349 So. 2d 622 (Fla. 1976); *Leimgruber v. Claridge Associates, Ltd.*, 73 N.J. 450, 375 A.2d 652, 656 (1977). See generally, Annot., 40 A.L.R. 4th 11, § 15 (1985).

<sup>9</sup> See *Pezzano v. Bonneau*, 133 Vt. 88, 329 A.2d 659, 661 (1974).

<sup>10</sup> See, e.g., Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1, 58-60 (1982); Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 666-67 (1980); Comment, *Frustration of Purpose*, 9 Pac. L.J. 823 (1978); Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev., at 1180; Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517 (1957).

<sup>11</sup> Comment, *Frustration of Purpose*, 9 Pac. L.J., at 823, 825.

<sup>12</sup> Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J., at 639.

<sup>13</sup> K. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* § 1800, at 21 (1985).

<sup>14</sup> Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 Drake L. Rev. 195, 219 (1977-78).

<sup>15</sup> Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev., at 1180. Accord, Prosser & Keeton, *The Law of Torts* § 2, at 15 (5th ed. 1984).

<sup>16</sup> Compare *Auburn Harpswell Assoc. v. Day*, 438 A.2d 234 (Me. 1981)



also by the conflicting results yielded by that test within various jurisdictions.

For example, in Colorado, punitive awards for assault and battery that were ten and thirty-six times greater than actual damages have been upheld,<sup>17</sup> whereas a 4:1 ratio in another assault case has been found excessive.<sup>18</sup> In Kansas, awards bearing punitive-to-compensatory ratios of 30:1, 24:1, and 11:1 have been upheld,<sup>19</sup> while a 6:1 ratio has been found excessive.<sup>20</sup> Similarly, in Texas, punitive-to-compensatory ratios of 40:1, 19:1, 14:1, and 8.6:1 have been sustained,<sup>21</sup> while a 8.6:1 ratio has been found ex-

(60:1 not excessive) with *Malcolm v. Little*, 295 A.2d 711, 714 (Del. 1972) ("The judicial conscience of this Court is shocked by the disproportionate award of punitive damages of \$6,000 as against the compensatory damage award of \$3,000."). See also *Morris, Punitive Damages in Tort Cases*, 44 Harv. L. Rev., at 1180 (and cases cited therein) ("Judgments in which punitive damage verdicts have hardly exceeded the actual damages have been reversed as excessive and judgments allowing punitive damages many times as great as the actual damages have been affirmed.").

<sup>17</sup> *Mailloux v. Bradley*, 643 P.2d 797 (Colo. App. 1982).

<sup>18</sup> *Kresse v. Bennett*, 151 Colo. 549, 379 P.2d 807 (1963). See also *Alley v. Gubser Development Co.*, 569 F. Supp. 36, 40 (D. Colo. 1983), *rev'd on other grounds*, 785 F.2d 849 (10th Cir.), *cert. denied*, 107 S. Ct. 457 (1986). (applying Colorado law) (10:1 ratio is so disproportionate as to shock the judicial conscience).

<sup>19</sup> *Sampson v. Hunt*, 233 Kan. 572, 665 P.2d 743 (1983); *Ettus v. Orkin Exterminating Co.*, 233 Kan. 555, 665 P.2d 730 (1983); *Binyon v. Nesselth*, 231 Kan. 381, 646 P.2d 1043 (1982).

<sup>20</sup> *Slough v. J.I. Case Co.*, 8 Kan. App. 2d 104, 650 P.2d 729 (1982). See also *Dearmore v. Gold*, 400 F.2d 887, 888 (10th Cir. 1968) (apparently applying Kansas law) (11:1 ratio is "so extremely disproportionate that we must assume that the jury acted either with passion or prejudice.").

<sup>21</sup> *Tynberg v. Cohen*, 32 S.W. 157 (Tex. Civ. App. 1895, writ ref'd); *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981); *Carr v. Galvan*, 650 S.W.2d 864 (Tex. Civ. App. 1983) (writ ref'd n.r.e.); *Parker v. McGinnes*, 594 S.W.2d 550 (Tex. Civ. App. 1980).

cessive.<sup>22</sup> And in Iowa, awards with punitive-to-compensatory ratios of 12.5:1, 7:1, and 6.5:1 have been upheld,<sup>23</sup> while ratios of 1.9:1, 1.6:1, and 1:1 have been found excessive.<sup>24</sup>

The unworkability of the rule is further demonstrated by its necessary abdication by courts where compensatory damages are small, nominal or nonexistent.<sup>25</sup> These self-evident discrepancies have led the Iowa Supreme Court to concede:

Precedent is of little value here and the [reasonable relationship] standard by which the award is to be measured is so indefinite that it offers small help.

*McCarthy v. J.P. Cullen & Son Corp.*, 199 N.W.2d 362, 369 (Iowa 1972).<sup>26</sup>

In short, both the arbitrary and anomalous results produced by its purported application and the irreconcilability of the reasonable relationship rule with the stated purposes of punitive damages amply demonstrate the error in embracing such a rule of law for determining constitutional

<sup>22</sup> *Ward v. Shriro Corp.*, 579 S.W.2d 257 (Tex. Civ. App. 1978).

<sup>23</sup> *International Harvester Co. v. Iowa Hardware Co.*, 146 Iowa 172, 122 N.W. 951 (1909); *Tyler v. Bowen*, 124 Iowa 452, 100 N.W. 505 (1904); *Union Mill Co. v. Prenzler*, 100 Iowa 540, 69 N.W. 876 (1897);

<sup>24</sup> *Sergeant v. Watson Bros. Transp. Co.*, 244 Iowa 185, 52 N.W.2d 86 (1952); *Crum v. Walker*, 241 Iowa 1173, 44 N.W.2d 701 (1950); *Hartman v. Peterson*, 246 Iowa 41, 66 N.W.2d 849 (1954).

<sup>25</sup> See, e.g., *Robison v. Lescremier*, 721 F.2d 1101, 1113 (7th Cir. 1983) (applying Wisconsin law) (\$10,000 punitive damages; 6 cents compensatory damages); *Alessio v. Hamilton Auto Body, Inc.*, 21 Ohio App. 3d 247, 486 N.E.2d 1224 (1985) (\$30,000 punitive damages; \$1 compensatory damages).

<sup>26</sup> See also *Riley, Punitive Damages: The Doctrine of Just Enrichment*, 27 Drake L. Rev., at 216-18.

excessiveness. As discussed in the next section of this brief, there is also another fundamental flaw in the reasonable relationship test that requires its rejection.

**B. A Constitutional Rule Limiting Punitive Damage Awards to a Multiple of Compensatory Damage Awards Would Not Curb the Excessiveness of Punitive Damages in an Effective or Principled Manner**

A rationale that might be advanced in support of the "reasonable relationship" test would be that, even if that test does not necessarily reflect society's interest in retribution and deterrence in particular cases, it nevertheless might produce constitutionally "acceptable" results because awards of compensatory damages are themselves subject to some limiting principle. Therefore, limiting punitive damages to amounts tied to compensatory damages would at least produce, in the main, rational and uniform results.<sup>27</sup> That assumption is, however, contrary to centuries of practice under which juries have been given virtually unfettered discretion with respect to the appropriate

<sup>27</sup> Justice O'Connor's concurrence in *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1655 (1988), suggested that the unpredictability and windfall nature of punitive damage awards was inconsistent with the dictates of due process. As Goodyear demonstrates below, the unpredictability of a jury's compensatory award is substantially tolerated under our system of law. Every time a jury assesses the appropriate amount of damages, for example, for mental anguish, emotional distress, or pain and suffering, the courts are loathe to interfere with that determination. See *Washington Gas Light Co. v. Landsden*, 172 U.S. 534, 555 (1899) ("[W]here . . . compensatory damages may be based upon the injury to the feelings and good name of a plaintiff . . . [the amount of] compensatory damages rests . . . largely in the discretion of a jury."). Permitting punitive awards that bear some relation to actual injury as measured by the jury's award of compensatory damages would thus provide neither additional protection nor predictability to defendants potentially subject to punitive damage awards.

amount of compensatory damages required to make a plaintiff whole. The multiple of a number which is itself within the almost unfettered discretion of a jury cannot possibly be relied upon as a benchmark for implementing the Eighth Amendment's requirement of proportionality.

*1. Courts Have Long Been Reluctant To Interfere With a Jury's Award of Compensatory Damages*

It is a fundamental principle of English and American jurisprudence that questions of law are for the court, and questions of fact are for the jury. The amount of damages, under our common-law system, has long been recognized as a "fact" to be found by the jury.<sup>28</sup> Accordingly, courts are, and have traditionally been, extremely reluctant to interfere with a jury's assessment of damages.<sup>29</sup>

The enormous discretion currently afforded juries in the awarding of damages is firmly rooted in English legal tradition.<sup>30</sup> Juries under early English common law were composed of local citizens called together to determine, by their own testimony, the merits of a neighborhood quarrel. The familiarity of jurors with the matters in dispute led courts to defer to that intimacy and to decline to review the amount of damages determined by the jurors to be appropriate.<sup>31</sup> Under that early system, the jury exercised virtually "unlimited control over the subject of remuneration." 4 T. Sedgwick, *Damages* § 1316, at 2656 (9th ed. 1912).<sup>32</sup>

<sup>28</sup> See *Tathwell v. City of Cedar Rapids*, 122 Iowa 50, 97 N.W. 96, 96 (1903).

<sup>29</sup> 4 T. Sedgwick, *Damages* §§ 1316-1319 at 2658-60 ("[O]n mere questions of fact the court always interferes with great hesitation and reluctance.").

<sup>30</sup> K. Redden, *Punitive Damages* § 2.2(A)(2), at 26 (1980).

<sup>31</sup> K. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* § 1.02, at 3.

<sup>32</sup> See also 1 T. Sedgwick, *Damages* § 349, at 688.



As time went by, jurors became further removed from personal knowledge of the facts. Yet the English courts retained much of their early reluctance to interfere with a jury's determination of the damages. Thus, in *Townsend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994, 994-95 (1677), "an outrageous verdict of 4,000 for scandalizing a politician was held to be beyond the court's touching, 'since by the law the jury are the judges of the damages.'" <sup>33</sup> So too, in *Wilmot v. Berkley*, Trin. 31 & 32, G.2, B.R., where the jury gave 500 in damages for "criminal conversation," the court refused to grant a new trial motion based upon excessive damages, "because in cases of tort the jury are the only proper judges of the damages."<sup>34</sup> Even as late as the time of Lord Mansfield, counsel was able to state the law to be that:

The Court cannot measure the ground on which the jury find damages that may be thought large . . . . [B]oth parties put themselves upon the jury to abide by their decision, as to the quantity of damages, as well as whether any or not.

*Gilbert v. Berkinshaw*, Lofft, 771, 98 Eng. Rep. 911, 911 (1773).

To be sure, by the end of the Eighteenth Century courts exercised increasing control over the measure of damages in contract actions and tort actions involving injury to property, situations in which fixed rules of compensation

<sup>33</sup> C. McCormick, *Handbook on the Law of Damages* § 6 at 26-27 (1935) (quoting *Townsend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994, 994-95 (1677)). See also *Russell v. Palmer*, 2 Wils. K.B. 325, 95 Eng. Rep. 837 (1767) (In an action against an attorney for negligence, the jurors were told they might find what damages they pleased.); *Beardmore v. Carrington*, 2 Wils. K.B. 244, 95 Eng. Rep. 790 (1764). See generally 1 T. Sedgwick, *Damages* § 349, at 688.

<sup>34</sup> *Beardmore v. Carrington*, 2 Wils. K.B. 244, 95 Eng. Rep. 790, 793 (1764) (explaining the holding of *Wilmot v. Berkley*, Trin 31 & 32 G.2, B.R.).

had begun to emerge.<sup>35</sup> However, "where personal suffering or outraged feelings complicated the estimate of damages, the court still held itself incompetent to review the verdict of the jury." 1 T. Sedgwick, *Measure of Damages* § 349, at 689.

Directly pertinent to this case, it has been persuasively established that the entire class of English cases establishing the doctrine of "exemplary" damages and authorizing juries to return awards far beyond any concept of just compensation for wrong suffered originated with the courts' reluctance to adjust, tamper with, or set aside a jury's monetary award.<sup>36</sup> For example, in the seminal case of *Huckle v. Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 168 (1763), the court's unwillingness to overturn an award believed to be fifteen times greater than the amount of damages was sustained by Lord Chief Justice Camden's assumption that he had little, if any, authority to second guess the jury verdict:

Upon the whole, I am of the opinion the damages are not excessive; and that *it is very dangerous for the Judges to intermeddle in damages for torts*; it must be a glaring case instead of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages.

*Id.*, at 768-69 (emphasis added).<sup>37</sup>

Early American courts were quick to mirror their English counterparts' reluctance to interfere with a jury's ver-

<sup>35</sup> See 1 T. Sedgwick, *Damages* § 349, at 688-89; W. Hale, *Handbook on the Law of Damages* § 6, at 27 (2d ed. 1912).

<sup>36</sup> See 1 T. Sedgwick, *Damages* §§ 349-50, at 689-90; W. Hale, *Damages* §§ 87-88, at 302; Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev., at 518-19.

<sup>37</sup> See also *Beardmore v. Carrington*, 2 Wils. K.B. 244, 95 Eng. Rep. 790 (1764); *Townsend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994 (1677).



dict of *compensatory* damages.<sup>38</sup> Part of this reluctance stemmed from the gradual expansion of the concept of actual damages to include compensation for intangible injuries, such as mental anguish and pain and suffering. These intangibles made it difficult for a court to apply objective standards of review to compensatory damage awards—for what is an excessive amount for damaged feelings or great pain? These were and are determinations left to the jury under our system of law. And so the rule evolved in early American courts that broad discretion would be given a jury's determination of compensatory damages, particularly where nonpecuniary injuries were involved.<sup>39</sup> The most frequently quoted and paraphrased standard adopted by the courts for determining when a reviewing court could tamper with or set aside a jury's compensatory award was propounded by Chancellor Kent in an 1812 libel case:

The damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, as such as manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption. In short, the damages must be flagrantly

<sup>38</sup> See, e.g., *Whipple v. Cumberland Mfg. Co.*, 2 Story, 661, Fed. Cas. No. 17,516 (1843) (per Story, J.); *Thurston v. Martin*, 5 Mason 497, Fed. Cas. No. 14,018 (1830) (per Story, J.); *Berry v. Vreeland*, 21 N.J.L. 183, 187 (1847); *Harris v. Zanone*, 93 Cal. 59, 28 P. 845, 848 (1892); *Worster v. Proprietors of Canal Bridge Co.*, 16 Pick. (Mass.) 541, quoted in *W. Hale, Damages* §§ 96-97, at 342-44. ("In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the court, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case.")

<sup>39</sup> See, e.g., *Payne v. The Pacific Mail Steamship Co.*, 1 Cal. 32 (1850); *Warren v. Cole*, 15 Mich. 265 (1867); *McLean v. City of Lewiston*, 8 Idaho 472, 69 P. 478 (1902).

outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess.

*Coleman v. Southwick*, 9 Johns. (N.Y.) 45, 6 Am. Dec. 253 (1812).<sup>40</sup>

This historical reluctance to interfere with a jury's award of compensatory damages has persisted to this day. As documented in the Appendix, *infra*, virtually every trial and appellate court<sup>41</sup> in every state and federal circuit in the United States adheres to a substantially similar—if not identical—standard of review of a jury's compensatory award where damages are even arguably uncertain<sup>42</sup>.

In Minnesota, where the *Goodyear* jury sat, the test to be applied to warrant the Minnesota courts' substitution of their judgment for the jury's is whether the jury award of damages is "so inadequate or excessive that \* \* \* it could only have been rendered on account of passion or

<sup>40</sup> See also C. McCormick, *Handbook on the Law of Damages* § 18, at 71-72 (1935).

<sup>41</sup> Trial court review of a jury's compensatory damage award is limited to the granting of a new trial for excessive damages or the use of remittur or additur. Appellate review of the jury's award generally takes two forms: (1) review of the trial judge's failure to grant a new trial for excessive damages under an abuse of discretion standard; or (2) review of the excessiveness of damages as a matter of law.

<sup>42</sup> As demonstrated by the Appendix, virtually every state and every circuit has grafted some, if not all, of Chancellor Kent's terminology into their standard of review of compensatory damage awards. In West Virginia, for example:

[A]n appellate court will not set aside a jury verdict upon the claims that it is excessive, "unless the verdict is monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and such as manifestly shows jury passion, partiality, prejudice, or corruption."

*Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791, 800 (W. Va. 1986) (citations omitted).

prejudice." *Flanagan v. Lindberg*, 404 N.W.2d 799, 800 (Minn. 1987). The Minnesota courts "will not interfere with the jury's award of damages unless its failure to do so would be shocking or would result in plain injustice." *Hughes v. Sinclair Marketing, Inc.*, 389 N.W.2d 194, 199 (Minn. 1986).

On the occasions that this Court has been called upon to review damage awards in federal cases, it too has been extraordinarily deferential to compensatory awards entered by juries. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 394 U.S. 100, 123 (1969); *Grunenthal v. Long Island R.R.*, 393 U.S. 156, 160 (1968). The Court has, for example, repeatedly held in antitrust cases that a jury need only make a "just and reasonable estimate" of the amount of damages for the verdict to stand. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). See also *Story Parchment Co. v. Peterson Parchment Paper Co.*, 282 U.S. 555, 565-66 (1931) ("The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done.")

Thus, it remains as true today as it was 200 years ago that only in the clearest cases—and only then with "the greatest caution and reluctance"—will a court interfere with a jury's assessment of compensatory damages. W. Hale, *Handbook on The Law of Damages* §§ 96-97, at 342 (2d ed. 1912).

2. *Given the Great Deference Paid to Compensatory Damage Awards by the Courts, It Would Be Fundamentally Unfair and Irrational To Permit the Constitutional Excessiveness of Punitive Damage Awards To Be Determined by a "Multiple" of the Compensatory Award in a Particular Case*

The foregoing history of the judicial system's extreme reluctance to supervise and interfere with compensatory damage awards demonstrates the fundamental unfairness and irrationality of denying the constitutional protection of the Excessive Fines Clause to a defendant on the

grounds that the punitive damage award against it bears some specified or unspecified ratio to the compensatory damage award in the same case. Reliance on such a standard would, if employed uniformly, undoubtedly result in the affirmance of punitive damage awards totally disproportionate to the harm to society and totally unrelated to fulfilling the goal of deterrence. To hold that such punishment is constitutionally permissible if it is "X times" or "reasonably related to" an essentially unreviewable amount (the compensatory damage award) would be to inject additional uncertainty and unfairness into an already irrational, subjective process by which juries select, and courts review, the size of punitive damage awards.

For example, under Vermont law, a court will not interfere with a jury's award of compensatory damages unless "it [is] so small or large that it plainly indicates the award was the product of prejudice or other misguidance which undermines its validity as a verdict." *Larmay v. Van Etten*, 129 Vt. 368, 278 A.2d 736, 740 (1971). Under this standard, the *Browning-Ferris* jury presumably could have returned, without court interference, a compensatory award on the state tort claim much greater than the \$51,000 actually awarded. Accordingly, any standard that would condition, even tangentially, the defendant's punishment on the wide range of permissible verdicts would appear to be arbitrary and inconsistent with the dictates of due process. See *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1656 (1988) (O'Connor, J., concurring).

3. *Use of a Fixed Ratio To Determine the Constitutional Excessiveness of a Punitive Award Is Similarly Inappropriate*

Inasmuch as double and treble damages have a "historical pedigree" in statutory punitive actions,<sup>43</sup> it has oc-

<sup>43</sup> For example, Congress has authorized the trebling of actual damages as a measure of additional damages in antitrust cases. Section 4



casionaly been proposed that a fixed ratio of two- or three-to-one of punitive to compensatory damages might be an appropriate common law standard for determining the excessiveness of a punitive award. See *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 331 (5th Cir. 1981) (applying Texas law). Virtually every court that has addressed this proposition, albeit not in the constitutional context, has rejected the application of a "fixed ratio" rule.<sup>44</sup> The "refusal to specify a [mathematical] ratio is due to the need to individualize punitive damage verdicts." *Campus Sweater and Sportswear Co. v. M.B. Kahn Construction Co.*, 515 F. Supp 64, 106 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981). Moreover, to the extent that the reasonable relationship rule has been criticized for its ambiguities and anomalies, a fixed ratio rule would be subject to the same objections, because, if followed, it would produce equally

of the Clayton Act. 15 U.S.C. § 15. But, as the cases of this Court clearly show, Congress authorized antitrust treble damages to serve a number of purposes, only one of which is penal. See *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 314 (1978) ("The Court has noted that Section 4 has two purposes: to deter violators and deprive them of 'the fruits of their illegalities,' and 'to compensate victims of antitrust violations for their injuries.'") (citations omitted); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 485 (1977) ("Section 4... is in essence a remedial provision."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging private challenges to antitrust violations.") (emphasis in original); *American Society of Mechanical Engineers Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575-76 (1982) ("Treble damages 'make the remedy meaningful by counter-balancing the difficulty of maintaining a private suit' under the antitrust laws.") (citations omitted). Thus, treble damages under the antitrust laws serve quite different, more expansive purposes than punitive damages. Accordingly, the treble damage model is essentially irrelevant to the issues under consideration in this case, except to the extent that any portion of a treble damage award would have to be viewed as purely punitive.

<sup>44</sup> See e.g., *Torres v. North American Van Lines, Inc.*, 135 Ariz. 35, 658 P.2d 835, 840 (Ariz. App. 1982); *Miller v. Carnation Co.*, 39 Colo. App. 1, 564 P.2d 127, 131 (1977); K. Ghiardi & J. Kircher, *Punitive Damages*, *supra*, § 18.05.

unusual results. See, e.g., *Taylor v. Sandoval*, 442 F. Supp. 491 (D. Colo. 1977) (applying Colorado law) (jury award of \$4,000 punitive and \$1 compensatory damages reduced by trial court to \$5 punitives to maintain a reasonable relation).

More fundamentally, even if a fixed ratio rule were workable in practice, nothing in the text, history or structure of the Excessive Fines Clause provides any basis for determining constitutional excessiveness by reference to any such ratio. In any event, it is not at all evident how the Court would be able to arrive at any particular ratio by which to limit punitive awards. While the Excessive Fines Clause clearly demands proportionality, it does not set forth such a fixed ratio itself.

In short, the extraordinary repercussions of punitive damages to defendants and our economy, together with the Eighth Amendment, demand that courts exercise objective and principled control over their imposition and assessment. Although a reasonable relationship rule may have some superficial appeal, it should be candidly recognized that it would offer little guidance to the reviewing courts, would not advance in any rational way the purposes and functions of punitive damages, would not provide any meaningful protection to defendants facing punitive damage awards, and would be inconsistent with the history and meaning of the Eighth Amendment.

## CONCLUSION

This brief does not suggest that any particular theory of punishment, retribution or deterrence be written into the Constitution. It simply asks that the prohibition of excessive government fines contained in the Excessive Fines Clause be applied to constrain the discretion of juries and judges to impose punishments that are disproportion-



ate to society's legislatively expressed judgment as to the consequences for specified conduct.

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## APPENDIX

## APPENDIX

APPELLATE SCOPE OF REVIEW OF JURY  
AWARDS OF COMPENSATORY DAMAGES IN THE  
FIFTY STATES AND THIRTEEN FEDERAL CIRCUITS

## ALABAMA

*Trimble v. Todd*, 510 So. 2d 810, 813 (Ala. 1987) ("The amount of damages awarded is left to the discretion of the jury under proper instructions, and its decision will generally not be overturned unless the amount is so excessive as to show passion, bias, prejudice, or other improper motive, or is against the great weight and preponderance of the evidence.")

## ALASKA

*Fruit v. Schreiner*, 502 P.2d 133, 145 (Alaska 1972) (" '[W]e shall not set aside an award on a claim of excessiveness unless it is so large as to strike us that it is manifestly unjust, such as being the result of passion or prejudice or a disregard of the evidence or rules of law.' ")

## ARIZONA

*Starkins v. Bateman*, 150 Ariz. 537, 724 P.2d 1206, 1217-18 (Ariz. Ct. App. 1986) ("The amount of a damage award is a question peculiarly within the province of the jury, and it will not be overturned or tampered with unless the verdict was the result of passion and prejudice. . . . Where the trial judge has otherwise refused to interfere with the jury's verdict, this court will not interpose its own judgment unless convinced that the amount is so outrageously excessive to suggest, at first blush, passion or prejudice.")

## ARKANSAS

*AAA T.V. & Stereo Rentals, Inc. v. Crawley*, 284 Ark. 83, 679 S.W.2d 190, 191 (1984) ("Under our cases the [jury's assessment of damages] will ordinarily not be disturbed on appeal unless clearly the result of passion or prejudice, or so great as to shock the conscience of the court.")

## CALIFORNIA

*Greenfield v. Spectrum Investment Corp.*, 219 Cal. Rptr. 805, 174 Cal. App. 3d 111, 123 (2d Dist. 1985) ("In reviewing the amount of [compensatory] damages, we determine every conflict in favor of the prevailing party who is entitled to the benefit of every inference. We do not interfere with an award unless the verdict is so large it suggests passion, prejudice or corruption on the part of the jury.")

## COLORADO

*Smith v. Hoyer*, 697 P.2d 761, 765 (Colo. App. 1984) ("The amount of damages is within the sole province of the jury, and an award will not be disturbed unless it is completely unsupported by the record.")

## CONNECTICUT

*Herb v. Kerr*, 190 Conn. 136, 459 A.2d 521, 523 (1983) ("The assessment of damages is peculiarly within the province of the trier and the award will be sustained so long as it does not shock the sense of justice. The test is whether the amount of damages awarded falls within the necessarily uncertain limits of fair and just damages.")

## DELAWARE

*Delmarva Power & Light v. Stout*, 380 A.2d 1365, 1368 (Del. 1977) ("The Court will not set aside a

verdict unless it is so grossly excessive as to shock the Court's conscience and sense of justice, and unless the injustice is clear.")

## FLORIDA

*Odoms v. Travelers Ins. Co.*, 339 So. 2d 196, 198 (Fla. 1976) ("[A] verdict should not be disturbed on the ground of excessiveness unless it is manifestly so excessive as to shock the judicial conscience, or unless it is so excessive as to be indicative of prejudice, passion or corruption on the part of the jury, or unless it clearly appears that the jury ignored the evidence or misconceived the merits . . .")

## GEORGIA

*Cullen v. Timm*, 184 Ga. App. 80, 360 S.E.2d 745, 748 (1987) ("Even though the evidence is such as to authorize a greater or lesser award than that actually made, the appellate court will not disturb it unless it is so flagrant as to 'shock the conscience.'")

## HAWAII

*Quedding v. Arisumi Bros., Inc.*, 66 Haw. 335, 661 P.2d 706, 709 (1983) ("In reviewing a jury's award of damages when a claim of excessiveness is pressed upon us for decision, we are bound by the general rule that a finding of an amount of damages is so much within the exclusive province of the jury that it will not be disturbed on appellate review unless palpably not supported by the evidence, or so excessive and outrageous when considered with the circumstances of the case as to demonstrate that the jury in assessing damages acted against rules of law or suffered their passions or prejudices to mislead them.")



## IDAHO

*Barlow v. International Harvester Co.*, 95 Idaho 881, 522 P.2d 1102, 1119 (1974) ("The power of this court over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury.")

## ILLINOIS

*King v. American Food Equipment Co.*, 160 Ill. App. 3d 898, 513 N.E.2d 958, 969 (Ill. App. 1987) ("The test for an excessive verdict is whether it falls within the necessarily flexible limits of fair and reasonable compensation or is so large as to shock the judicial conscience.")

## INDIANA

*Groves v. First National Bank of Valparaiso*, 518 N.E.2d 819, 831 (Ind. App. 1988) ("Where the damage award is so outrageous as to indicate the jury was motivated by passion, prejudice, partiality, or the consideration of improper evidence, we will find the award excessive.")

## IOWA

*Harsha v. State Savings Bank*, 346 N.W.2d 791, 799 (Iowa 1984) ("[W]e do not disturb jury verdicts pertaining to damages unless they are flagrantly excessive or inadequate, so out of reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support.")

## KANSAS

*Ratterree v. Bartlett*, 238 Kan. 11, 707 P.2d 1063, 1072 (1985) ("Where a charge of excessive verdict

is based on passion or prejudice of the jury, but is supported solely by the size of the verdict the trial court will not be reversed for not ordering a new trial, and no remittitur will be ordered unless the amount of the verdict in light of the evidence shocks the conscience of the appellate court.")

## KENTUCKY

*Davis v. Graviss*, 672 S.W.2d 928, 933 (Ky. 1984) ("In short, the rules governing appellate practice do not direct the appellate judge to decide if the verdict shocks his conscience or causes him to blush. Those rules charge us with the responsibility to review the record and decide whether, when viewed from a standpoint 'most favorable' to the prevailing party, there is evidence to support the verdict and judgment.")

## LOUISIANA

*Scott v. Hospital Service Dist. No. 1 of St. Charles Parish*, 496 So. 2d 270, 274 n.11 (La. 1986) ("A determination of the measure of damages will not be disturbed on appeal unless the trier of fact abused its much discretion [sic] in making the award . . . .")

## MAINE

*Braley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359, 361 (Me. 1982) ("We must uphold the [jury's assessment of damages] unless it has no rational basis in the record or the jury acted under some bias, prejudice, or improper influence, or reached its verdict by compromise.")

## MARYLAND

*Ory v. Libersky*, 40 Md. App. 151, 389 A.2d 922, 931 (1978) ("In the absence of prejudicial error in

the trial court's instructions, the amounts of the verdicts are not reviewable on appeal.")

## MASSACHUSETTS

*Homsi v. C.H. Babb Co.*, 409 N.E.2d 219, 222 (Mass. App. Ct. 1980) (" '[A]n award of damages must stand unless . . . to permit it to stand was an abuse of discretion on the part of the court below, . . . amounting to an error of law.' ")

## MICHIGAN

*Jenkins v. Southeastern Michigan Chapter, American Red Cross*, 141 Mich. App. 785, 369 N.W.2d 223, 230 (Mich. App. 1985) ("A reviewing court will substitute its judgment for that of the jury only where the verdict has been secured by improper methods, prejudice or sympathy, or where it is so excessive as to 'shock the judicial conscience.' . . . Where a verdict is within the range of evidence produced at trial, this Court will not reverse it as excessive and against the great weight of evidence.")

## MINNESOTA

*Flanagan v. Lindberg*, 404 N.W.2d 799, 800 (Minn. 1987) ("The test to be applied by an appellate court is whether the jury award of damages is 'so inadequate or excessive that \*\*\* it could only have been rendered on account of passion or prejudice.' ")

## MISSISSIPPI

*City of Jackson v. Locklar*, 431 So. 2d 475, 481 (Miss. 1983) ("We will not vacate or reduce a damage award unless it is so out of line as to shock the conscience of the Court.")

## MISSOURI

*Fort Zumwalt School District v. Recklein*, 708 S.W.2d 754, 756, (Mo. App. 1986) ("Appellate courts will not disturb a jury's assessment of damages 'unless the amount is so grossly excessive that it shocks the conscience of the court.' ")

## MONTANA

*Giles v. Flint Valley Forest Products*, 179 Mont. 382, 538 P.2d 535, 540 (1979) ("The rule is that given we have a justice system which confides to juries the duty to determine the issues and to fix the amount of compensation to be paid, unless the award is such to shock the conscience and understanding, it must be accepted as conclusive.")

## NEBRASKA

*Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56, 78 (1987) ("A verdict will not be set aside on appeal unless it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the trier of fact disregarded the evidence or rules of law.")

## NEVADA

*Miller v. Schnitzer*, 78 Nev. 301, 371 P.2d 824, 828-29 (1962) ("The extent of such damage, by its very nature, falls peculiarly within the province of the trier of fact, in this case, a jury. . . . The core of the matter seems to be that an appellate court will disallow or reduce the award if its judicial conscience is shocked; otherwise it will not.")

## NEW HAMPSHIRE

*Gelinas v. Mackey*, 123 N.H. 690, 465 A.2d 498, 500 (1983) ("This court will not set aside a verdict

as excessive unless it appears that no reasonable person could have made such an award.")

## NEW JERSEY

*Baxter v. Fairmont Food Co.*, 74 N.J. 588, 379 A.2d 225, 229-30 (1977) ("The judgment of the initial fact-finder . . . is entitled to very considerable respect. It should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination . . . that the continued viability of the judgment would constitute a manifest denial of justice.")

## NEW MEXICO

*Ranchers Exploration and Development Corp. v. Miles*, 102 N.M. 387, 696 P.2d 475, 478 (1985) ("On appeal, a jury award will not be set aside as excessive unless the award is not supported by substantial evidence, or the jury was swayed by passion or prejudice, or employed an incorrect measure of damages.")

## NEW YORK

*Ostrowski v. Apex Marine Corp.*, 123 A.D.2d 257, 506 N.Y.S.2d 164, 166 (N.Y.A.D. 1 Dept. 1986) ("To warrant interference with a jury's assessment of damages, the excessiveness or inadequacy of the award must be such as to shock the conscience of the court.")

## NORTH CAROLINA

*Mattox v. Huneycutt*, 3 N.C. App. 63, 164 S.E.2d 28, 29 (1968) ("This court will not substitute its judgment for that of the triers of the facts.")

## NORTH DAKOTA

*Eriksen v. Boyer*, 225 N.W.2d 66, 75 (N.D. 1974) ("Before we find a verdict excessive, we must find that the amount awarded is so unreasonable and extreme as to indicate passion and prejudice on the part of the jury.")

## OHIO

*Carter v. Simpson*, 16 Ohio App. 3d 420, 476 N.E.2d 705, 709 (1984) ("The jury's determination of damages should not be set aside unless the damages awarded were so excessive as to appear to have been awarded as a result of passion or prejudice, or unless the amount is so unmanifestly against the weight of the evidence as to show a misconception by the jury of its duties.")

## OKLAHOMA

*Walker v. St. Louis - San Francisco Ry. Co.*, 646 P.2d 593, 599 (Okla. 1982) ("The issue of damages is left to the judgment of the jury, subject to our correction only if the jury was activated by prejudice or guilty of 'abuse and passionate exercise.'")

## OREGON

*Huston v. Trans-Mark Services, Inc.*, 45 Or. App. 801, 609 P.2d 848, 853-54 (1980) ("As to excessiveness of the damage award, the Supreme Court [of Oregon has held] that since the adoption of the constitutional amendment, Art. VII, § 3, there is no judicial review of a jury verdict merely for excessiveness of damages.")

## PENNSYLVANIA

*Lewis v. Pruitt*, 37 Pa. Super. 419, 487 A.2d 16, 22 (1985) ("This court will not find a verdict excessive unless it is so excessive as to shock our sense of justice.")



## RHODE ISLAND

*Bruno v. Caianiello*, 121 R.I. 913, 404 A.2d 62, 65 (1979) ("We shall not disturb a jury's award unless the amount awarded 'shocks the conscience,' or indicates that the jury was influenced by 'passion or prejudice,' or that it proceeded on some erroneous basis.")

## SOUTH CAROLINA

*Easler v. Hejaz Temple A.A.O.N.M.S. of Greenville, S.C.*, 285 S.C. 348, 329 S.E.2d 753, 758 (1985) ("It is only when the verdict is so grossly excessive and the amount awarded so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other consideration not found on the evidence that it becomes the duty of this court, as well as of the trial court, to set aside the verdict absolutely.")

## SOUTH DAKOTA

*Koenig v. Weber*, 84 S.D. 558, 174 N.W.2d 218, 225 (1970) ("A verdict which is not derived from the mere process of computation will not be interfered with unless it is so excessive or so grossly inadequate as to indicate prejudice, passion, partiality or corruption on the part of the jury, or unless based upon a clear misconception.")

## TENNESSEE

*Clark v. Engelberg*, 58 Tenn. App. 721, 436 S.W.2d, 465, 468 (1968) ("The amount of the verdict is primarily for the jury to determine. . . . It is not within the province of an appellate court to substitute its judgment for that of the jury and the Trial Judge.")

## TEXAS

*Country Roads, Inc. v. Witt*, 737 S.W.2d 362, 365 (Tex. Civ. App. 1987) ("The amount to be recovered rests primarily within the discretion of the jury; it will not be disturbed on appeal on the ground of excessiveness in the absence of a clear showing of passion, bias, or prejudice and a finding that the award is so excessive as to shock the conscience of the court.")

## UTAH

*Bennion v. LeGrand Johnson Const. Co.*, 701 P.2d 1078, 1084 (Utah 1985) ("A reviewing court will defer to a jury's damage award unless the award indicates that the jury disregarded competent evidence, . . . or that the award is so excessive beyond rational justification as to indicate the effect of improper factors in the determination, . . . or that 'it clearly appears that the award was rendered under [a] misunderstanding.'")

## VERMONT

*Larmay v. Van Etten*, 129 Vt. 368, 278 A.2d 736, 740 (1971) ("This court will not interfere unless it appears that the jury's determination is so small or large that it plainly indicates the award was the product of prejudice or other misguidance which undermines its validity as a verdict.")

## VIRGINIA

*Gazette, Inc. v. Harris*, 229 Va. 1, 325 S.E.2d 713, 740 (1985) ("Unless the amount of the award is so excessive as to shock the conscience of the court, or to create the impression that the jury was influenced by passion or prejudice, a verdict approved by the trial court will not be disturbed on appeal.")

## WASHINGTON

*Kirk v. Washington State University*, 109 Wash. 2d 448, 746 P.2d 285, 294 (1987) ("The determination of the amount of damages is primarily and peculiarly within the province of the jury, and an appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have resulted from passion or prejudice.")

## WEST VIRGINIA

*Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791, 800 (W. Va. 1986) ("In West Virginia, an appellate court will not set aside a jury verdict upon the claims that it is excessive, 'unless the verdict is monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and such as manifestly shows jury passion, partiality, prejudice, or corruption.'")

## WISCONSIN

*Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 405 N.W.2d 354, 374 (Wisc. App. 1987) ("If there is any credible evidence which under any reasonable view supports the jury finding as to the amount of damages, especially where the verdict has the approval of the trial court, this court will not disturb the finding unless the award shocks the judicial conscience.")

## WYOMING

*Union Pacific R.R. v. Richards*, 702 P.2d 1272, 1278 (Wyo. 1985) ("Where law thus provides no specific measure for quantifying damages, the amount to be awarded rests almost totally within the discretion of the jury, and courts, both trial and

appellate, are reluctant to interfere with that decision unless by its excessiveness or inadequacy the award carries with it an implication of passion, prejudice or bias or the result of some erroneous error.'")

## FIRST CIRCUIT

*Segal v. Gilbert Color Systems, Inc.*, 746 F.2d 78, 80-81 (1st Cir. 1984) ("This Court has consistently declined to play Monday morning quarterback in reviewing a jury's assessment of damages. A verdict should stand unless it is 'grossly excessive,' 'inordinate,' 'shocking to the conscience of the court,' or 'so high that it would be a denial of justice to permit it to stand.'")

*LaForest v. Autoridad de Las Fuentes Fluviales de Puerto Rico*, 536 F.2d 443, 447 (1st Cir. 1976) ("[T]he jury's otherwise supportable verdict stands unless 'grossly excessive' or 'shocking to the conscience.'")

## SECOND CIRCUIT

*Wheatley v. Ford*, 679 F.2d 1037, 1039 (2d Cir. 1982) ("When reviewing a claim of excessive damages, an appellate court must accord substantial deference to the jury's determination of factual issues.")

## THIRD CIRCUIT

*Rocco v. Johns-Manville Corp.*, 754 F.2d 110, 114 (3d Cir. 1985) ("Our scope of review is narrow, and we must affirm the jury's damage award unless it is so grossly excessive as to shock the judicial conscience.")

*W.A. Wright, Inc. v. KDI Sylvan Pools, Inc.*, 746 F.2d 215, 219 (3d Cir. 1984) ("A jury award of

damages is not to be upset so long as there exists sufficient evidence on the record which, if accepted by the jury, would sustain the verdict.")

#### FOURTH CIRCUIT

*Martin v. Fleissner GMBH*, 741 F.2d 61, 65 (4th Cir. 1984) ("The amount of damages is peculiarly within the discretion of the jury and subject to correction . . . by an appellate court only 'in those extreme cases in which the amount assessed is so shockingly excessive as manifestly to show that the jury was actuated by caprice, passion, or prejudice.' ")

*Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 201 (4th Cir. 1982), *cert. denied*, *Aetna Casualty and Surety Co. v. U.S.*, 460 U.S. 1102 (1983), on rehearing, 712 F.2d 899, *cert. denied*, 464 U.S. 1040 (1984) ("Our review . . . is only to assess whether on an independent review of the evidence . . . the awards were so 'untoward, inordinate, unreasonable or outrageous,' . . . that we must set them aside in exercise of our review power.")

*Compton v. Wyle Laboratories*, 674 F.2d 206, 209 (4th Cir. 1982) ("The assessment of damages is entrusted to the jury, and is not subject to review unless unconscionable or motivated by extreme prejudice.")

#### FIFTH CIRCUIT

*Wallace v. Oceaneering International*, 727 F.2d 427, 439 (5th Cir. 1984) ("When a jury as primary fact finder awards a certain measure of damages and the court refuses to upset that finding, we are not at liberty to reverse those decisions absent a definite finding of error.")

*Wood v. Diamond M Drilling Co.*, 691 F.2d 1165, 1168 (5th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983), ("We have repeatedly held that a jury's award is not to be disturbed unless it is so large as to 'shock the judicial conscience,' indicate 'bias, passion, prejudice, corruption, or other improper motive' on the part of the jury, . . . or is 'contrary to all reason.' ")

*Adams v. Ford Motor Credit Co.*, 556 F.2d 737, 740 (5th Cir. 1977) ("[I]t is only in case the amount awarded by a jury appears to be so excessive as to be unconscionable and to arise from bias or prejudice that the appellate court considers it appropriate to intervene.")

#### SIXTH CIRCUIT

*American Anodco, Inc. v. Reynolds Metals Co.*, 743 F.2d 417, 424 (6th Cir. 1984) ("This court will not overturn a jury verdict on the basis of the amount of the award if the verdict is within the range of proof and the jury was properly instructed.")

*Hammonds v. Ingram Industries, Inc.*, 716 F.2d 365, 373 (6th Cir. 1983) ("This is not a case where the verdict is unsupported by evidence and the jury was motivated by passion, prejudice or improper considerations. Accordingly, we decline to disturb the judgment on this ground.")

#### SEVENTH CIRCUIT

*Levka v. City of Chicago*, 748 F.2d 421, 424 (7th Cir. 1984) ("In reviewing a jury verdict for damages to determine whether it is excessive, we must defer to the judgment of the jury unless the award is 'monstrously excessive' or 'so large as to shock the conscience of the court.' ")



*Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 971 (7th Cir. 1983) ("We therefore would not set aside a jury's verdict as excessive unless . . . the verdict was 'monstrously excessive' . . . or in the equivalent formulation of the Indiana courts 'so excessive as to be flagrantly outrageous and extravagant.' ")

### EIGHTH CIRCUIT

*Dabney v. Montgomery Ward & Co., Inc.*, 761 F.2d 494, 501 (8th Cir.), *cert. denied*, 474 U.S. 904 (1985) ("[W]e shall . . . consider review . . . not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is a 'plain injustice' or a 'monstrous' or 'shocking result.' ")

*Herold v. Burlington Northern, Inc.*, 761 F.2d 1241, 1248 (8th Cir.), *cert. denied*, 474 U.S. 888 (1985) ("When a verdict is so excessive it shocks the conscience of this court, it will be set aside.")

*Ferren v. Richards Mfg. Co.*, 733 F.2d 526, 531 (8th Cir. 1984) (Jury assessment of damages "will not be overturned by this Court unless there is a 'plain injustice' or a 'monstrous' or 'shocking result.' ")

### NINTH CIRCUIT

*Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1501 (9th Cir. 1986) ("A jury's finding of the amount of damages must be upheld unless the amount is clearly not supported by the evidence and is grossly excessive, monstrous, or shocking to the conscience.")

*Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1216 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007, *reh.*

*denied*, 471 U.S. 1120 (1985) ("Generally, we will not reverse the jury's assessment of the amount of damages unless the amount is 'grossly excessive or monstrous,' . . . or unless the evidence clearly does not support the damage award.")

*Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204, 1208 (9th Cir. 1982) ("Only where the reviewing court is left with a 'definite and firm conviction that a mistake has been committed' will the damage award be disturbed.")

### TENTH CIRCUIT

*Acree v. Minolta Corp.*, 748 F.2d 1382, 1388 (10th Cir. 1984) ("[A]bsent an award so excessive or inadequate as to shock the conscience and to raise an irresistible inference that passion, prejudice, corruption, or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate.")

*Hudson v. Smith*, 618 F.2d 642, 646 (10th Cir. 1980) ("A jury's verdict regarding the amount of damages should be upheld unless it is clearly erroneous, or there is no evidence to support it.")

### ELEVENTH CIRCUIT

*Clark v. Beville*, 730 F.2d 739, 741 (11th Cir. 1984) ("Our review of the excessiveness of the jury's verdict is limited to an examination of the plaintiff's injuries to determine whether the damage award is beyond the maximum possible award supported by the evidence in the record.")

### D.C. CIRCUIT

*Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1238-39, (D.C. Cir. 1984) ("In reviewing the actual

amount of a jury's award, our task is limited and a reluctance to interfere is our touchstone. . . . Our inquiry ends once we are satisfied that the award is within a reasonable range and that the jury did not engage in speculation or other improper activity.")

#### FEDERAL CIRCUIT

*Weiner v. Rollform Inc.*, 744 F.2d 797, 808 (Fed. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) ("Jury damage awards, unless the product of passion and prejudice, are not easily overturned or modified on appeal.")

**AMICUS CURIAE**

**BRIEF**



13  
No. 88-556

**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1988**

Supreme Court, U.S.

**FILED**

**JAN 19 1989**

JOSEPH E. SPANIOLO, JR.  
CLERK

**BROWNING-FERRIS INDUSTRIES OF  
VERMONT, INC. and BROWNING-FERRIS  
INDUSTRIES, INC.,**

**Petitioners,**

**-v.-**

**KELCO DISPOSAL, INC. and JOSEPH  
KELLEY,**

**Respondents.**

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**BRIEF FOR AMICUS CURIAE,  
THE CITY OF NEW YORK**

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**BRIEF FOR AMICUS CURIAE,  
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---

**INTEREST OF AMICUS CURIAE**

The City of New York submits this brief in support of reversal of the judgment of the Court of Appeals for the Second Circuit. In the instant case, the Court of Appeals affirmed a judgment of the United States District Court for the District of

Vermont which, in part, awarded the plaintiffs compensatory damages in the amount of \$51,146 and punitive damages in the amount of \$6 million. The Court of Appeals rejected a challenge to the award of punitive damages based upon the Excessive Fines Clause of the Eighth Amendment of the United States Constitution. That Court stated in its decision that "[e]ven if the eighth amendment does apply to this nominally civil case . . . , we do not think the damages here were so disproportionate as to be cruel, unusual, or constitutionally excessive." Kelco Disposal v. Browning-Ferris Industries of Vermont, 845 F.2d 404, 410 (2d Cir. 1988), cert. granted, \_\_\_ U.S. \_\_\_, 109 S.Ct. 527 (1988).

This is the third case in recent years to bring before this Court the issue of the Eighth Amendment's effect upon awards of punitive damages. In both Bankers Life and



Casualty Co. v. Crenshaw, \_\_\_ U.S. \_\_\_, 108 S. Ct. 1645 (1988), and Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986), this Court resolved the case without having to address this recurring constitutional issue. In both cases, various amici curiae informed the Court about the growth in recent years of the frequency and size of awards of punitive damages. These amici curiae have most often been insurance companies and defense counsel.

The City of New York has also felt the sting of this growth of punitive damage awards. The City suffers even though it is immune from a direct assessment of punitive damages under both New York law and the federal civil rights statutes. Sharapata v. Town of Islip, 56 N.Y.2d 332, 452 N.Y.S.2d 347 (1982); City of Newport v. Fact Concerns, Inc., 453 U.S. 247 (1981).

This immunity does not shield the City from the weight of punitive damages. The City has frequently indemnified City employees who have been assessed punitive damages in civil cases. This indemnification arises from section 50-k of the New York General Municipal Law (McKinney 1986). General Municipal Law §50-k(2) requires the Corporation Counsel, upon the commencement of an action against a City employee, to make an initial determination whether the act or omission at issue "occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred." Once the Corporation Counsel makes that determination in the employee's favor, the City provides for the defense of the employee in that civil action.

General Municipal Law §50-k(3) provides that the City indemnify its employees for any judgment arising from an action or omission which "occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged damages were sustained." The statute further provides that the duty to indemnify does not arise "where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee."

The City has borne the weight of punitive damages in cases where the Corporation Counsel believes that the employee acted properly within the scope of his or her employment. Once that determination is made, the City does not abandon employees because the jury reaches



a contrary conclusion, perhaps influenced by the vision of a deep pocket. The City indemnifies its well-intentioned employees regardless of the jury verdict. Thus does the City feel the sting of escalating punitive damages.

Even apart from indemnification, the specter of punitive damages affects the City by affecting the attitude of its employees. The high profile of the City's perceived deep pocket may encourage punitive awards where not even compensatory damages are appropriate. The best judgment of conscientious City employees may understandably be chilled by the prospect of punitive damages. The skyrocketing levels of these awards make this delicate situation that much more chilling.

#### **SUMMARY OF ARGUMENT**

The antecedents of the Excessive Fines Clause applied to financial penalties which

were assessed in civil cases. History indicates that the Excessive Fines Clause does not apply only in criminal cases. Punitive damages, on the other hand, serve the purposes of punishment and deterrence, classic goals of the criminal justice system. Applying the Excessive Fines Clause to punitive damages will foster a strong public policy in restoring that part of the tort system to rationality. Should this Court hold that punitive damages come within the scope of the Excessive Damages Clause, legislative reforms of the tort system will likely follow.

#### POINT I

#### THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT IS APPLICABLE TO PUNITIVE DAMAGES.

In a case involving the Cruel and Unusual Punishments Clause, this Court stated that "[s]ome punishments, though not labeled 'criminal' by the State, may be

sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." Ingraham v. Wright, 430 U.S. 651, 669, n.37 (1977). As that passage implies, this issue cannot be resolved as a simple exercise in taxonomy. It would be a gross simplification to state that the Excessive Fines Clause exists in a purely criminal corner of the world, that punitive damages are off in a purely civil corner of the world, and that never the twain shall meet. The history of the Excessive Fines Clause is entwined with a variety of civil devices which assessed financial penalties for punishment and deterrence. The modern device of punitive damages exists to punish and deter without regard to compensation, classic goals of our criminal justice system. This Court will have to go beyond labels and consider the



true mission of the Excessive Fines Clause in our modern society.

**A. The Civil History of the Excessive Fines Clause**

The history of the Excessive Fines Clause and the Eighth Amendment generally has been set forth in a variety of writings. This Court has discussed the origins of the Eighth Amendment in two recent cases involving the Cruel and Unusual Punishments Clause. See Solem v. Helm, 463 U.S. 277, 284-286 (1983); Ingraham v. Wright, *supra*, 430 U.S. at 664-666. The Supreme Court of Georgia recently examined that history in Colonial Pipeline Co. v. Brown, 258 Ga. 113, 365 S.E.2d 827 (1988), *appeal dismissed*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 36 (1988). Three recent law review articles present the history of the Excessive Fines Clause in depth. See Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons From History, 40 Vand. L. Rev. 1233,

1240-1269 (1987); Note, The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment, 85 Mich. L. Rev. 1699, 1714-1719 (1987); Jeffries, A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 153-158 (1986). The briefs in the Bankers Life and Aetna cases discussed that history, as undoubtedly will the various briefs submitted in this matter. The following discussion is a look at only the highlights of that history.

The adoption of the Eighth Amendment was not accompanied by extensive debate on the scope of the Excessive Fines Clause. The First Congress proposed the Eighth Amendment to the state legislatures on September 25, 1789. It read and still reads that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The

Amendment was ratified on December 15, 1791. Congress had reacted to calls for a written Bill of Rights by proposing what are now the first ten amendments to our Constitution. The Eighth Amendment was not the product of Congress' creative draftsmanship; it was taken almost verbatim from the Virginia Declaration of Rights of 1776. Congress debated this amendment very briefly. None of the debate was devoted to the scope of the Excessive Fines Clause. Massey, supra p. 9, at 1241-1242.

Immediately prior to taking up the Eighth Amendment, Congress considered the Fifth Amendment. Id. There was debate about whether the privilege against self-incrimination should apply in civil proceedings. The result was an amendment which specifically limited that privilege to criminal cases. Such limiting language was not included in the Excessive Fines Clause.



The concept of "excessive fines" is equally capable of application in civil cases as is the concept of "self-incrimination," which Congress felt obliged to limit expressly.

Punitive damages in their modern shape were practically unknown in this country in 1789. Indeed, the first reported English cases expounding the concept of punitive damages in the modern form had been decided only in 1763. Massey, supra p. 9, at 1266; Note, supra p. 10, - at 1718, n. 126. The Excessive Fines Clause was not adopted with punitive damages as we now know them in mind. In determining whether the Excessive Fines Clause regulates punitive damages, the policy behind the Clause is the soundest guide to its scope. To define that policy, one must examine the historical antecedents of the Eighth Amendment, antecedents which the First Congress adopted for use on the national level.

Congress took the Eighth Amendment almost verbatim from the Virginia Declaration of Rights. Section nine of the Virginia Declaration of Rights stated "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Virginia Convention of 1776 adopted the Declaration of Rights as well as proposing that the thirteen colonies declare their independence. George Mason was the author of the Declaration of Rights. Mason's declared purpose was to claim "the Liberties & Privileges of Englishmen, in the same Degree, as if we had still continued among our Brethren in Great Britain." Solem v. Helm, supra, 463 U.S. at 286, n. 10. The Declaration of Rights preserved the rights of Englishmen, amassed over centuries, for the pioneers of Virginia. The First Congress also intended to preserve the rights of

**AMICUS CURIAE**

**BRIEF**



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., and  
BROWNING-FERRIS INDUSTRIES, INC.,  
*Petitioners,*

v.

KELCO DISPOSAL, INC., and JOSEPH KELLEY,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF THE UNITED STATES  
CHAMBER OF COMMERCE, NATIONAL ASSOCIATION  
OF MANUFACTURERS, THE MOTOR VEHICLE  
MANUFACTURERS ASSOCIATION OF THE  
UNITED STATES, INC., THE BUSINESS ROUNDTABLE,  
AMERICAN CORPORATE COUNSEL ASSOCIATION,  
RISK AND INSURANCE MANAGEMENT SOCIETY, INC.,  
PRODUCT LIABILITY ADVISORY COUNCIL, INC.,  
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## QUESTIONS PRESENTED

1. Whether a punitive damages judgment presumptively violates the Excessive Fines Clause of the Eighth Amendment if the judgment is imposed pursuant to state laws that provide unchanneled jury discretion on the issues of whether to award punitive damages and what amount of punitive damages to impose, and that also provide no objective standard for judicial review of punitive damages awards.

2. Whether a punitive damages judgment for wrongful pricing activities violates the Excessive Fines Clause if it exceeds (1) the maximum legislatively established criminal fines for conduct of the same or similar gravity, (2) the maximum legislatively established civil fines for conduct of the same or similar gravity, (3) the maximum legislatively fixed punitive damages awards for misconduct of the same or similar gravity, and (4) the maximum discretionary punitive damages award judicially approved for conduct of the same or similar gravity in the same state.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

\_\_\_\_\_  
 No. 88-556  
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BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., and  
 BROWNING-FERRIS INDUSTRIES, INC.,

v. *Petitioners,*

KELCO DISPOSAL, INC., and JOSEPH KELLEY,  
*Respondents.*

\_\_\_\_\_  
 On Writ of Certiorari to the United States  
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AMICUS CURIAE BRIEF OF THE UNITED STATES  
 CHAMBER OF COMMERCE, NATIONAL ASSOCIATION  
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 MANUFACTURERS ASSOCIATION OF THE  
 UNITED STATES, INC., THE BUSINESS ROUNDTABLE,  
 AMERICAN CORPORATE COUNSEL ASSOCIATION,  
 RISK AND INSURANCE MANAGEMENT SOCIETY, INC.,  
 PRODUCT LIABILITY ADVISORY COUNCIL, INC.,  
 AND THE PRODUCT LIABILITY ALLIANCE  
 IN SUPPORT OF THE PETITIONERS

\_\_\_\_\_  
**STATEMENT OF INTEREST**

The United States Chamber of Commerce, National Association of Manufacturers, Motor Vehicle Manufacturers Association of the United States, Inc., the Business Roundtable, American Corporate Counsel Association, Risk and Insurance Management Society, Inc., Product Liability Advisory Council, Inc., and the Product Liability Alliance, with the consent of the parties, hereby file this



brief as *amici curiae* in support of the Petitioners.<sup>1</sup> The *amici* and their members represent the interests of the nation's business and manufacturing community.

The U.S. Chamber of Commerce is America's largest federation of businesses, representing more than 180,000 companies, several thousand trade and professional associations, and hundreds of state and local Chambers of Commerce. The National Association of Manufacturers is an association of approximately 13,500 companies and subsidiaries that together employ 85% of all manufacturing workers in the United States and produce more than 80% of the nation's manufactured goods. The Motor Vehicle Manufacturers Association is a trade association whose member companies build motor vehicles and manufacture industrial, lawn and agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches and gasoline and diesel engines for various industrial and agricultural uses.

The Business Roundtable is an association of some 200 chief executive officers of companies from a variety of businesses and geographic locations who examine public issues that affect the economy and develop positions which seek to reflect sound economic and social principles.

The American Corporate Counsel Association ("ACCA") is a national bar association of approximately 7500 attorneys from the legal staffs of corporations and other business entities in the private sector who are called upon to advise their clients regarding litigation and settlement of claims filed against them. The Risk and Insurance Management Society, Inc., the world's largest association of risk management professionals, consists of approximately 4,200 industrial and service corporations, governmental bodies and nonprofit organizations.

The Product Liability Advisory Council, Inc., is an association of industrial companies that was formed for

<sup>1</sup> Consent letters have been filed with the Clerk.

the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. The Product Liability Alliance consists of more than 300 manufacturing businesses, wholesaler-distributors and trade associations from a wide range of industries, and was formed in 1981 for the purpose of seeking uniform federal product liability laws.

This case is of interest to the *amici* because their members and clients are the primary victims of a punitive damages system which the legislatures and the trial and appellate courts have failed to exercise their constitutional duties to control. As the principal voice of the business and manufacturing communities, the *amici* are well suited to present to the Court the effects of unrestrained, disproportionate punitive damage awards on commercial enterprises, and the reasons that such awards violate the Excessive Fines Clause of the Eighth Amendment.

#### STATEMENT OF THE CASE

This case arises out of a civil action brought by respondent Kelco Disposal, Inc. and Joseph Kelley ("Kelco") in the United States District Court in Vermont, alleging that petitioners Browning-Ferris Industries of Vermont, Inc. and Browning-Ferris Industries, Inc. ("Browning-Ferris") attempted to monopolize the waste-disposal industry in Burlington, Vermont. A jury returned a verdict for Kelco of \$51,146 in compensatory damages on a federal antitrust count, and \$51,146 in compensatory damages and \$6 million in punitive damages on a state law count of tortious interference with contractual relations. Petitioners attacked the \$6 million punitive damages award as a violation of the Excessive Fines Clause of the Eighth Amendment. The Court granted *certiorari* on December 5, 1988. *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 527 (1988).

## SUMMARY OF ARGUMENT

The Excessive Fines Clause of the Eighth Amendment requires proportionality between the gravity of wrongdoing and the fines that are imposed to punish and deter such wrongdoing, regardless of whether the fines are denominated criminal fines, civil fines, punitive damages awards fixed in amount by statute, or punitive damages awards imposed by juries exercising discretion. The required proportionality cannot systematically obtain, however, if the fines are imposed as punitive damages under laws that (1) only loosely define the conduct and culpability that must be proven before punishment can be imposed, (2) give juries unbridled discretion to choose whether or not to impose punishment once the requisite culpability has been established, (3) provide neither fixed limits nor cognizable standards to guide juries in deciding what amount of punishment to inflict, and (4) provide reviewing courts with no objective standard against which to determine the propriety of punitive damages awards. Because it would be purely fortuitous for punitive damages awarded under such a standardless system to promote proportionality or any other legitimate penal purpose, such awards presumptively violate the Excessive Fines Clause. At a bare minimum, such awards should be subject to heightened scrutiny.

In addition, even if punitive damages are imposed pursuant to guidelines that pass constitutional muster, the proportionality, and therefore the constitutionality, of any particular punishment must be determined by reference to objective standards. At a bare minimum, when a state establishes no standards for determining punitive damages awards, an award violates the Excessive Fines Clause if it exceeds (1) the maximum legislatively established criminal fines for conduct of the same or similar gravity, (2) the maximum legislatively established civil fines for conduct of the same or similar gravity, (3) the maximum legislatively fixed punitive damages awards for misconduct of the same or similar gravity,

and (4) the maximum discretionary punitive damages award judicially approved for conduct of the same or similar gravity in the same state.

## STATEMENT

Punitive damages are penal in nature. Punitive damages are intended not to compensate plaintiffs, but to punish defendants, and to deter persons similarly situated from acting improperly in the future.<sup>2</sup> Because of the characteristics described below, the punitive damages systems in most states fail to further their legitimate purposes.

### A. Primary Characteristics of the Prevailing Punitive Damages System

The punitive damages system that exists in the United States today is characterized by: (1) an absence of clear standards for defining the conduct and culpability on which punitive damages may be based; (2) an absence of any standard to determine whether punitive damages should be awarded, once the requisite culpability has been found; (3) an absence of standards for determining the appropriate amount of punitive damages; (4) an absence of objective standards for judicial review; (5) an inappropriate burden of proof; (6) the admissibility of prejudicial evidence of defendant's wealth even during the trial of liability and compensatory damages issues; and (7) in mass product liability and tort cases, the imposition of multiple punishments for a single act.<sup>3</sup>

<sup>2</sup> See W. Prosser & W.P. Keeton, *The Law of Torts* § 2, at 9 (5th ed. 1984); C. McCormick, *Handbook on the Law of Damages* § 77, at 275 (1935); D. Dobbs, *Handbook on the Law of Remedies* § 3.9, at 204 (1973); W. Prosser, J. Wade & V. Schwartz, *Torts: Cases and Materials* 528-29 (8th ed. 1988); M. Franklin & R. Rabin, *Tort Law and Alternatives: Cases and Materials* 622 (4th ed. 1987). See also *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

<sup>3</sup> The first four of these characteristics were present in this case; the last three are additional problems that elsewhere contribute to excessive punitive damages awards.



**1. The Absence of Clear Standards for Defining Conduct and Culpability on Which Punitive Damages May Be Based**

The terms used by state courts to describe the conduct or culpability that must serve as the basis for an award of punitive damages are diverse, contradictory and, in most cases, hopelessly vague.<sup>4</sup> In this case, for example, the district court instructed the jury that punitive damages could be based on "extraordinary misconduct," "outrageous conduct," or "a willful and wanton or reckless disregard of the plaintiff's rights." C.A. 1180. Juries in other states are told to impose damages if they find that the defendant acted with "wanton or reckless disregard for the rights of others." See, e.g., *American Laundry Machinery Industries v. Horan*, 412 A.2d 407, 419 (Md. Ct. Spec. App. 1980). Other states say that "gross negligence" is enough. See Tex. Civ. Prac. & Rem. Code Ann. § 41.003 (Vernon 1987). Some speak of "rudeness" or mere "caprice." See *Newton v. Standard Fire Insurance Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976). None of those terms is defined or circumscribed by objective guidelines.

**2. The Absence of Standards for Determining Whether Punitive Damages Should Be Awarded, Once the Requisite Culpability Has Been Found**

Once it determines that a defendant's misconduct meets the threshold of culpability, the jury has unbridled discretion to award or withhold punitive damages. See W. Prosser & W.P. Keeton, *The Law of Torts*, supra n.2, § 3, at 14. The jury is given no standard or guideline describing how to exercise that discretion. The jury simply is instructed that it may award punitive dam-

<sup>4</sup> For a comprehensive survey of state laws concerning punitive damages, see R. Schloerb, R. Blatt, R. Hammesfahr & L. Nugent, *Punitive Damages: A Guide to the Insurability of Punitive Damages in the United States and Its Territories* (1988).

ages to the plaintiff if it finds the defendant acted with the requisite culpability. See, e.g., C.A. 1180.

**3. The Absence of Standards for Determining the Appropriate Amount of Punitive Damages**

The great majority of states, including Vermont, establish no standards or guidelines that juries or courts must use to determine the maximum permissible award in a case. No relationship is established between the harm caused and the size of the punitive award, or between compensatory damages and punitive damages. Nor is any relationship established to parallel criminal fines, civil fines, or prior punitive damages awards in the same jurisdiction. Unlike criminal fines and civil fines denominated as such, no standard is established to ensure that punishments in cases involving the same misconduct are approximately the same. Nor is there any amount of punitive damages that a jury may award under the general punitive damages laws.<sup>5</sup>

Generally, as in this case, no instruction is given as to what must be considered or what must not be considered by the jury in determining the amount of punishment. No instruction regarding the deterrent and retributive functions of compensatory damages and defense costs is given.

The clearest point in most instructions is an invitation to consider the defendant's wealth. See, e.g., *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 459-60 (1980); *Sturm, Ruger & Co. v. Day*, 594 P.2d

<sup>5</sup> A few states have enacted specific limitations on general punitive damages awards. See, e.g., Conn. Gen. Stat. Ann. § 52-240b (West 1988) (punitive damages limited to two times compensatory damages); Colo. Rev. Stat. § 13-21-102 (Supp. 1986) (punitive damages limited to amount of actual damages; Fla. Stat. Ann. § 768.73 (West Supp. 1988) (punitive damages limited to three times compensatory damages).



38, 47-48 (Alaska 1979). As a result, the jury's only meaningful guideline for determining the amount of a punitive award is often the size of the defendant's purse. See D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation, The Story Behind the Statistics* 21 (1987).

#### 4. *The Absence of Objective Standards for Judicial Review*

The absence of standards to support either an award of punitive damages or calculation of the amount undermines the effectiveness of the trial courts' power to invoke remittitur, and the appellate courts' power to reverse. Most appellate courts reduce punitive damages awards only if they somehow intuit them to be infected by "passion or prejudice." Others, such as courts in Vermont, will take action only if they somehow conclude that the award is "manifestly and grossly excessive." *Pezzano v. Bonneau*, 133 Vt. 88, 91, 329 A.2d 659, 661 (1974).

In making these determinations, the courts themselves do not apply objective standards. Instead they substitute their own subjective notions for those of the juries. As one court candidly conceded, "Our reaction is admittedly visceral." *Rosenbloom v. Metromedia, Inc.*, 289 F. Supp. 737, 749 (E.D. Pa. 1968), *rev'd on other grounds*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971).

#### 5. *Inappropriate Burdens of Proof*

The Constitution requires that criminal cases be proved "beyond a reasonable doubt" and that certain civil cases be proved by "clear and convincing evidence." *In re Winship*, 397 U.S. 358, 364, 368 (1970) (criminal proceedings); *Santosky v. Kramer*, 455 U.S. 745, 762 (1982) (civil custody proceedings). Nevertheless, for punitive damages, most courts have held that proof by a mere "preponderance of the evidence" standard is

enough. See J. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* § 9:12 (1985).<sup>6</sup>

#### 6. *Admissibility of Prejudicial Evidence*

Only five states require bifurcated proceedings separating the trial of punitive damages from other issues.<sup>7</sup> Thus, most plaintiffs who seek punitive damages may introduce evidence of the defendant's wealth during their case in chief. Although such evidence is admissible only for the narrow purpose of determining the amount of punishment, the jury cannot effectively exclude it in determining whether the defendant is liable, the amount of compensatory damages to award, and whether the culpability required for punitive damages has been established.

#### 7. *Multiple Punitive Damage Awards for a Single Act*

Manufacturers of products found by juries to be defective can be exposed repeatedly to punitive damage assessments.<sup>8</sup> The current punitive damages system has

<sup>6</sup> Several states recently have recognized the penal nature of punitive damages and have imposed a higher burden of proof. At least nineteen states now require proof by "clear and convincing evidence" for punitive damages. See, e.g., Ala. Code § 6-11-20 (Supp. 1987); Alaska Stat. § 09.17.020 (1986); *Linchicum v. Nationwide Life Insurance Co.*, 150 Ariz. 326, 723 P.2d 675 (1986); Cal. Civ. Code § 3294(a) (West 1989). One state, Colorado, uses proof "beyond a reasonable doubt," the level of proof used in criminal cases. See Colo. Rev. Stat. § 13-25-127(2) (Supp. 1986).

<sup>7</sup> See Conn. Gen. Stat. § 52-240b (Supp. 1987); Ga. Code Ann. § 51-12-5.1(d)(2) (Supp. 1988); Kan. Stat. Ann. § 60-3701 (Supp. 1987); Mo. Ann. Stat. § 510.263 (Supp. 1989) (bifurcation if requested by any party; Mont. Code Ann. § 27-1-221(7)(a) (1987). One state, New Jersey, has a trifurcated procedure. See N.J. Rev. Stat. § 2A:58C-5(c) (1987) (first proceeding on compensatory damages; second proceeding on punitive damages liability; third proceeding on the amount of punitive damages). Colorado does not allow evidence of the defendant's income or net worth to be considered at all. See Colo. Rev. Stat. § 13-21-102(6) (Supp. 1986).

<sup>8</sup> Serial trials frequently result in disparate punitive damage awards in different cases arising from exactly the same facts. For example, numerous product liability cases were filed against the

developed no effective way to account for this phenomenon—each jury visits the question as if it were the *only* one looking at punitive damages.

### B. Effects of the Current Punitive Damages System

A comprehensive analysis of jury verdicts in the United States prepared by the RAND Institute for Civil Justice shows that the growth in the average award in product liability suits "has been truly explosive, reflecting increases ranging from 200 to more than 1000 percent" from the period 1960-1964 to 1980-1984. D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends In Tort Litigation: The Story Behind The Statistics*, *supra*, p. 8, at 18. That explosion has been paralleled by a dramatic increase in both the frequency and the size of punitive damages awards against manufacturers.

Before 1970, for example, there was only one reported appellate court decision upholding an award of punitive damages in a product liability case, an award of \$250,000. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Today, hardly a month goes by without a multi-million-dollar punitive damages verdict against a manufacturer.<sup>9</sup>

manufacturer of the drug Bendectin. These claims have resulted in jury verdicts in favor of the defendant (*see, e.g., Will v. Richardson-Merrell, Inc.*, 647 F. Supp. 544 (S.D. Ga. 1986)); summary judgment for the defendant on the issue of liability for compensatory damages (*see, e.g., Lynch v. Merrell-National Laboratories, Div. of Richardson-Merrell, Inc.*, 830 F.2d 1190 (1st Cir. 1987) (affirming district court's grant of summary judgment for defendant because plaintiffs failed to show Bendectin caused birth defects)); summary judgment for the defendant on the issue of punitive damages (*see, e.g., Hagen v. Richardson-Merrell, Inc.*, 697 F. Supp. 334 (N.D. Ill. 1988)); and a jury verdict of a punitive damages award for \$75 million (*see Ealy v. Richardson-Merrell, Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 740 (D.D.C. Oct. 1, 1987) (punitive damages remitted to zero)).

<sup>9</sup> *See, e.g., Stambaugh v. International Harvester Co.*, 102 Ill. 2d 250, 464 N.E.2d 1011 (1984) (\$15 million punitive damages verdict,

The empirical data show that the standardless punitive damages systems described above, selectively aimed at corporations and other "deep pockets,"<sup>10</sup> have had drastically deleterious effects on the range of products made available to further the health, comfort, and productivity of the American public, and on the ability of manufacturer equitably to settle other claims. Some of these effects are discussed below.

### 1. Withdrawal of Products From the Marketplace

The general aviation industry produced 18,000 aircraft per year in 1978 and 1979, but fewer than 1,000 in 1988. *See* H.R. Rep. No. 748, 100th Cong., 2d Sess.

remitted to \$650,000); *Cessna Aircraft Co. v. Fidelity & Casualty Co.*, 616 F. Supp. 671, 673 (D.N.J. 1985) (\$25 million punitive damages verdict); *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. Ct. App. 1986) (\$100 million punitive damages verdict, remitted to \$10 million); *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987) (\$7.5 million punitive damages verdict); *Ealy v. Richardson-Merrell, Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 740 (D.D.C. Oct. 1, 1987) (\$75 million punitive damages verdict, remitted to zero); *Kemner v. Monsanto Co.*, 15 Prod. Safety & Liab. Rep. (BNA) 884 (Ill. Cir. Ct. Oct. 22, 1987) (\$16.25 million punitive damages verdict); *George v. Raymark Industries, Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 865 (Del. Super. Ct. Nov. 9, 1987) (\$75 million punitive damages verdict); *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988) (\$10 million punitive damages verdict); *Rajala v. Allied Corp.*, No. 82-2282K (D. Kan. Apr. 25, 1988), *appeal docketed*, (10th Cir. May 9, 1988) (\$60 million punitive damages verdict); *Masaki v. General Motors Corp.*, 16 Prod. Safety & Liab. Rep. (BNA) 225 (Haw. Ct. App. Feb. 29, 1988) (\$11.25 million punitive damages verdict), *petition for cert. filed*, 57 U.S.L.W. 3296 (U.S. Oct. 14, 1988); *Batteast v. Wyeth Laboratories, Inc.*, 172 Ill. App. 3d 114, 526 N.E.2d 428 (1988) (\$13 million punitive damages verdict); *FDIC v. W.R. Grace Co.*, 691 F. Supp. 87 (N.D. Ill. 1988) (\$75 million punitive damages verdict).

<sup>10</sup> *See* M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* 50 (1987); D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind The Statistics*, *supra* p. 8.



24 (pt. 1) (1987) (statement of Edward W. Stimpson, President, General Aviation Manufacturers Assoc., Before the House Subcomm. on Commerce, Consumer Protection and Competitiveness). The decreased production was heavily influenced by punitive damages awards in cases such as *Cannuli v. Cessna Aircraft Co.*, Nos. 80-3285, 81-2209, 82-1052 (D.N.J. 1984) (\$25 million).

United States manufacturers of medical equipment similarly have abandoned certain markets. For example, Puritan-Bennett, a major domestic manufacturer of hospital equipment, stopped making anesthesia gas machines in 1984 because of rising liability costs, leaving two foreign manufacturers to dominate a market once filled by a half-dozen competitors. See Brody, *When Products Turn into Liabilities*, *Fortune*, Mar. 3, 1986, at 22.<sup>11</sup>

This phenomenon affects even the so-called "leisure" industries. For example, in 1976 there were eighteen manufacturers of football helmets. Now there are two. See Brown, *Insurance Costs, Lawsuits Injure U.S. Sports*, *J. Com.*, July 13, 1988, at A1, col. 2, A14, col. 5.

## 2. Reduced Development of New and Useful Products

A 1988 Conference Board survey of 4,000 companies in the United States reported: "About a third of all the firms surveyed—and nearly half of those reporting major impacts—have decided against introducing new products because of liability fears." See E.P. McGuire, *The Impact of Product Liability*, vii (1988). Several specific examples of this phenomenon have been reported:

<sup>11</sup> An \$8 million punitive damages award against the sole manufacturer of the polio vaccine on the theory that it had produced the wrong type of vaccine (the Sabin rather than the Salk vaccine) "almost jeopardized the viability of the entire polio vaccination program." Fortunately, the decision was reversed by a four-to-three vote of the Kansas Supreme Court in *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 718 P.2d 1318 (1986). R. Willard & R. Willmore, *An Update on the Liability Crisis: Tort Policy Working Group* 51 (1987).

- The President of Unison Industries, Inc., explained that his firm is *withholding an advanced electronic ignition system for light aircraft from the market* because of the liability risk that might result from its release and use. *Id.*
- The Chairman of the Board of Union Carbide Corporation reported that his company decided to *forgo development of a suitcase sized kidney dialysis unit* because "we believed [the] size of any damage claims and the probable cost of defending ourselves, made the whole thing uneconomic." Remarks of W. Anderson at the Annual Meeting of National Association of Casualty and Surety Executives (Oct. 7, 1986). He further reported that "it was the same reason we decided to *forgo offering IV equipment and the food packages for intravenous feeding* to our medical oxygen customers. It would have been a good service and a good business, but the costs of defending ourselves against the inevitable lawsuits caused us to drop it." *Id.* at 3 (emphasis added).

Similarly, the Chairman and Chief Executive Officer of Monsanto Company reported that, because of the uncertain punitive damages system, Monsanto

abandoned a possible substitute product for asbestos just before commercialization, not because it was unsafe or ineffective, but because a whole generation of lawyers had been schooled in asbestos liability theories that could possibly be turned against the substitute.

See Mahoney, *Punitive Damages: The Courts are Curb-ing Creativity*, *N.Y. Times*, Dec. 11, 1988, § 3, at 3, col. 1.

The project director for the National Academy of Sciences report, *Confronting AIDS—Directions for Public Health, Health Care, and Research*, stated, "[T]his general climate of uncertainty is something that deters many pharmaceutical companies from being involved in



AIDS vaccine research." See *Insurance Costs Deter AIDS Vaccine*, 1 Liab. & Ins. Bull. (BNA), at 5 (Nov. 3, 1986).

### 3. Effects on settlements

A study conducted by the United States Department of Justice on the liability crisis indicated that uncertainties in the punitive damages system "serve as a significant obstacle to the settlement process by giving the plaintiff unrealistic expectations of the value of his case even where the defendant has made a generous settlement offer." See R. Willard & R. Willmore, *An Update on the Liability Crisis: Tort Policy Working Group*, *supra* n.11. "It is close to impossible to negotiate sensibly with a plaintiff who believes that he can shoot for the moon." *Id.* (quoting Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. Mich. J.L. Ref. 575, 612 (1985)). Empirical data indicate that, in those claims in which claimants sought punitive damages, claim settlements rose an average of about ten percent. See ISO DATA, Inc., *Claim File Data Analysis: Technical Analysis of Study Results* 86-87 (Dec. 1988).

In sum, the lack of standards and arbitrariness of the punitive damages system has had a substantial and adverse impact on productivity in the United States.

## ARGUMENT

### I. PUNITIVE DAMAGES JUDGMENTS BASED ON UNCHANNELED JURY DISCRETION PRESUMPTIVELY VIOLATE THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT

The general punitive damages laws of Vermont and many other states give juries license to inflict such punishments arbitrarily and on the basis of prejudice. They permit juries to set the amount of punishment without reference to any cognizable standard. And they provide no objective standard for judicial review.

Under such systems, any relationship between the punishments imposed and the legitimate purposes of punishment is purely fortuitous. When a state chooses to employ a system that does little or nothing to ensure that punitive awards are even minimally channeled to promote their avowed legitimate purposes, punishments imposed under that system presumptively violate the Excessive Fines Clause of the Eighth Amendment.

#### A. The Excessive Fines Clause Requires Proportionality

In *Solem v. Helm*, 463 U.S. 277, 290 (1983), the Court held that the Eighth Amendment requires "that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Although the Court was there applying the Cruel and Unusual Punishment Clause to an excessive prison sentence, the Court observed that the amendment "imposes 'parallel limitations' on bail, fines, and other punishments." 463 U.S. at 289 (quoting *Ingraham v. Wright*, 430 U.S. 651, 664 (1977)). Also, in explaining why the Cruel and Unusual Punishment Clause requires proportionality for prison sentences, the Court took as beyond dispute that the Excessive Fines Clause requires proportionality for fines. See 463 U.S. at 288-90. Finally, in describing the proportionality requirement's roots in Magna Carta, the Court observed that the requirement derived from Magna Carta's prohibition against disproportionate amercements, which were "similar to a modern-day fine." 463 U.S. at 283 n.8 and accompanying text. Accordingly, *Solem* teaches that proportionality between the wrongs inflicted and the fines imposed is the bedrock requirement of the Excessive Fines Clause.<sup>12</sup>

<sup>12</sup> As shown at length by the brief *amicus curiae* submitted by *Golden Rule Insurance Co., et al.*, the history of the Excessive Fines Clause leaves no doubt that the clause was intended to apply to civil as well as criminal fines. See generally Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986);

**B. Punitive Damages Awards Based on Unchanneled Jury Discretion Fail to Provide Proportionality or to Promote Any Other Legitimate Penal Purpose**

The very essence of the proportionality requirement is consistency in the relationship between punishment and wrongdoing from case to case: the punishment imposed in one case for a particular misdeed must be similar in severity to punishments imposed in other cases for misdeeds of similar gravity, greater than punishments imposed in other cases for misdeeds of lesser gravity, and less than punishments imposed in other cases for misdeeds of greater gravity. Magna Carta indicated as much:

A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence . . . .

Magna Carta, ch. 20, quoted in W. McKechnie, *Magna Carta* 284 (2d ed. 1958). So has the Court. See *Solem*, 463 U.S. at 284-85. So, too, have moral philosophers of virtually every persuasion. See generally Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 845-57 (1972), (discussing I. Kant, *The Philosophy of Law* 194-98 (W. Hastie transl. 1887); J. Bentham, *An Intro-*

Note, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 Cal. L. Rev. 1433, 1441-47 (1987); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699 (1987). This Court has recognized punitive damages as a form of civil fine. See *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist & Powell, JJ., & Burger, C.J., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting). This brief therefore does not further address the question of the Excessive Fines Clause's applicability to punitive damages judgments.

*duction to the Principles of Morals and Legislation* 178-91 (1789)).

The proportionality requirement is a vital corollary of the broader constitutional prohibition "against arbitrary and discriminatory punishment." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) (applying Due Process Clause). See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As the Court has recognized in a variety of contexts, the required consistency and prevention of arbitrariness and unjust discrimination cannot be achieved unless punishments are imposed pursuant to cognizable, objective standards. See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion) ("It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. . . . Otherwise, 'the system cannot function in a consistent and rational manner.'"); cf. *Giaccio*, 382 U.S. at 402 (Due Process Clause violated by "vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory imposition of costs"). In the absence of such standards, juries can silently base their decisions to punish, and the severity of their punishments, upon invidious discrimination, prejudice, and even whim. Every punishment so motivated, no matter how small, would be excessive. See *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

Punishments therefore must be constrained by cognizable limits and guidelines fixed before the defendant has acted. See *United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute"); *Giaccio*, 382 U.S. at 405 n.8 (referring to constitutionality of allowing juries "to fix punishment within legally prescribed limits") (emphasis added).



A related constitutional infirmity in a system that allows the imposition of fines not limited by predetermined standards is this: such a system violates the principle of fundamental fairness reflected in the Constitution's proscription of *ex post facto* laws, a proscription that invalidates "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (1 Dall.) 386, 390 (1798) (Chase, J., separate opinion).<sup>13</sup>

Without predetermined standards for punishments, the *ex post facto* principle would be eviscerated. When a state's legislature and courts leave the size of fines to juries' unchanneled discretion, no fine of any magnitude can ever be said to have changed the punishment or to have inflicted a punishment greater than that allowed when the wrongdoing was committed.

The general punitive damages laws of Vermont and most other states violates these excessive principles. Because the jury's decision whether to award punitive damages, once the requisite culpability has been established, is unreviewable and may be based upon anything at all, it would be pure happenstance if any particular punitive award were to be proportionate to the wrongdoing committed or serve any other legitimate purpose. In other instances of the same (or more culpable) conduct by other defendants, juries may have awarded only compensatory damages and refrained, on the basis of bias, caprice, or sympathy, from awarding punitive damages. Cf. *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart,

<sup>13</sup> Accord *Lindsey v. Washington*, 301 U.S. 397, 401 (1937) ("The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."); *In re Medley*, 134 U.S. 160, 171 (1890) ("no one can be criminally punished in this country except according to a law prescribed . . . before the imputed offense was committed, or by some law passed afterwards, by which the punishment is not increased").

J., concurring) (Capital punishment imposed under the challenged statute was "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.")<sup>14</sup>

It is no answer for Vermont and others to assert that this is merely an exercise of jury discretion. See, e.g., *Pezzano v. Bonneau*, 133 Vt. 88, 90, 329 A.2d 659, 660. The authority that juries are exercising is not "discretion in the legal sense of that term, but . . . mere will. It is purely arbitrary and acknowledges neither guidance nor restraint." *Yick Wo v. Hopkins*, 118 U.S. at 366-67 (reviewing exercise of discretion in Fifth Amendment context).

[D]iscretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within bounds. Otherwise, . . . "[i]t is always unknown: It is different in different men: . . . In the best it is oftentimes caprice: In the worst it is every vice, folly, and passion, to which human nature is liable."

*McGautha v. California*, 402 U.S. 183, 285 (1971) (Brennan, Douglas & Marshall, JJ., dissenting).

<sup>14</sup> Problems with the standardless nature of punitive damages laws arise even in determinations of whether the requisite culpability has been established. Here, for example, the jury was told that punitive damages could be based on "extraordinary misconduct," "outrageous conduct," or "a willful and wanton or reckless disregard of the plaintiff's rights." C.A. 1180. None of those terms was defined. In *Giaccio*, the Court held "reprehensible," "improper," "outrageous to morality and justice," and "misconduct" impermissibly vague as tests for juries to employ in deciding whether to require an acquitted defendant to pay \$230.95 in court costs. 382 U.S. at 403. See also *Smith v. Wade*, 461 U.S. 30, 88 (1983) (Rehnquist & Powell, JJ., & Burger, C.J., dissenting) ("a vaguely defined, elastic standard like 'reckless indifference' gives free reign to the biases and prejudice of juries").



Nor is it prohibitively difficult for legislatures or courts to establish limits on, or objective standards for, punitive damages awards in order to ensure at least rough proportionality. Vermont, for example, has fixed maximum criminal fines for the entire panoply of criminal acts (*see, e.g.*, Appendix "C"); maximum civil penalties for a wide variety of civil misconduct (*see, e.g.*, Appendix "B"); and maximum punitive damages for still other civil misconduct (*see, e.g.*, Appendix "A"). Some of these fixed civil fines and punitive awards are for conduct that is similar in effect and culpability to antitrust conduct. *See, e.g.*, Vt. Stat. Ann. tit. 9, § 2461 (1984 & Supp. 1986) (treble damages for consumer fraud); Vt. Stat. Ann. tit. 5, § 1819 (1972 & Supp. 1986) (civil fines of specified sums for granting or consenting to special rebates). And, of course, Congress and dozens of state legislatures have established treble damages as the appropriate punitive damages for antitrust conduct such as the predatory pricing at issue in this case.

Nor has the application of these standardless laws, accompanied by an instruction that punitive damages are to punish and deter, generated a body of discernible, consistently applied common law guidelines. As the Court stated in another context:

All of the so-called court-created conditions and standards still leave to the jury such broad and unlimited power . . . that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is.

*Giaccio*, 382 U.S. at 403.

Predictably, this system has resulted not in consistent application of sound principles, but in identifiable discrimination against at least one group: corporate defendants. Researchers for the RAND Institute of Civil Justice concluded that "[c]orporate defendants are in fact more likely than individuals or public agents to be

the target of [punitive damages] awards" and that "[p]unitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings*, *supra* n. 10.

The excessiveness of punitive damages also results from unchanneled discretion exercised by juries in fixing the amount of the awards after the decision to impose punishment has been made. In various opinions in the last two decades, the Court has explicitly stated as much.<sup>15</sup>

Once again, neither proportionality nor any other cognizable standard is likely to be satisfied under these con-

<sup>15</sup> *See Gertz*, 418 U.S. at 350 (punitive damages laws leave juries "free to use their discretion selectively to punish expressions of unpopular views") (Powell, Marshall, Blackmun & Rehnquist, JJ.); *Foust*, 442 U.S. at 50 n.14 ("punitive damages may be employed to punish unpopular defendants") (Marshall, J., joined by Brennan, Stewart, White & Powell, JJ.); *Smith v. Wade*, 461 U.S. at 59 ("punitive damages are frequently based upon the caprice and prejudice of jurors") (Rehnquist, J., Burger, C.J. & Powell, J., dissenting); *cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) ("Because evidence of a tort-feasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award.") (Blackmun, J., joined by Burger, C.J., Stewart, White, Powell & Rehnquist, JJ.); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 74-75 (when punitive damages "bear no relationship to the actual harm caused, they then serve essentially as spring-boards to jury assessment, without reference to the primary legitimating compensatory function of the system, of an 'infinitely wide range of penalties wholly unpredictable in amount. Further, I find it difficult to fathom why it may be necessary, in order to achieve its justifiable deterrence goals, for the State to permit punitive damages that bear no discernible relationship to the actual harm caused.") (Harlan, J., dissenting); *id.* at 84 ("This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others.") (Marshall, J., dissenting).

ditions. Because juries are not even told that the punishment they inflict should be proportionate to the wrongdoing involved, and because they are not told what punishments have been imposed for similar misconduct in other cases, any case-to-case consistency in the relationship between the severity of punishment and the gravity of wrongdoing must be purely fortuitous. Similarly, because juries are not given any guidance regarding the principles of deterrence or retribution, any relationship between those principles and the juries' awards must be wholly accidental.

Moreover, effective deterrence does not require such untrammelled discretion. Deterrence theory assumes that potential actors will rationally weigh the benefits and costs likely to flow from contemplated wrongful conduct. Rational deterrence obtains, therefore, only if the actors are informed about the magnitude of the costs, including punishments, they are likely to incur if they engage in the proscribed conduct. If laws fail to establish standards for punitive damages awards, actors contemplating wrongful conduct can only guess at the likely consequences of their misdeeds.

Rational deterrence also requires that punishment be imposed in the amount, and only in the amount, necessary to ensure that the actors' expected costs (i.e., actual costs adjusted upward to account for the probability that the conduct will not be detected and successfully prosecuted by injured persons and that punishment will not be imposed), will equal any gain that they would otherwise expect to obtain from the contemplated wrongful conduct. See H. Packer, *The Limits of the Criminal Sanction* 45-48 (1968); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. I. Rev. 1, 23-24, 43-53 (1982); Note, *Punitive Damages for Libel*, 98 Harv. L. Rev. 847, 849-51 (1985). Punishment in any other amount will either deter desirable activity or fail to deter undesirable activity.

Punitive awards imposed pursuant to standardless jury submissions also fail to serve the state's retributive pur-

poses. The basic test of the propriety of punishment as retribution is that the punishment must be proportionate to the wrongdoing. See Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 846 (1972). Punitive damages imposed pursuant to standardless jury submissions violate the proportionality requirement, as already shown above.

The \$6 million punitive award against Browning-Ferris in this case illustrates the vices of the standardless scheme. First, an award of that size was unpredictable. Browning-Ferris could not have known that its pricing activities could result in such an award. The highest reported prior punitive damages award under Vermont law, for any type of conduct of even the most heinous nature, had been only \$300,000, in *Greenmoss Builders, Inc. v. Dunn & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414 (1983), *aff'd*, 472 U.S. 749 (1985). See Appendix "E."

Similarly the \$6 million award was in the nature of an *ex post facto* increase in the punishment for Browning-Ferris' conduct. All prior conduct of the same or greater degree of culpability, or that had caused actual harm equal to or greater than that caused by Browning-Ferris, had resulted in punitive damages in markedly lower amounts, or in no punitive damages at all.

Further, and for the same reason, the \$6 million punitive award cannot be said to be proportionate to the gravity of Browning-Ferris' wrongdoing. It is improbable that, in the 200-year history of Vermont, no more heinous act had ever been committed and presented to a jury by a plaintiff seeking punitive damages. It is even more improbable that, as implied by the twenty-to-one ratio between the \$6 million award and the previous highest award of \$300,000, Browning-Ferris' pricing activities were approximately twenty times more heinous, harmful or difficult to deter than any previous act by any person or entity in Vermont history.



Finally, the \$6 million punitive damages award cannot be said to be justified by the injury inflicted by Browning-Ferris' misconduct, or the wrongful gain that the misconduct might reasonably have been expected to generate. The jury found that the injury was only \$51,146. And the only "gain" derived by Browning-Ferris was its loss of greater and greater amounts of business to Kelco, such that Browning-Ferris ultimately had to leave the market altogether. Even if a substantial adjustment were made to account for the possibility that Browning-Ferris' challenged pricing practices might have proved more successful, the sum required to deter such conduct would not approach \$6 million.

In sum, it is apparent that punitive damages are imposed in Vermont pursuant to laws that specify no limits, no required relationship to culpability, no required relationship to the punishments for other acts of wrongdoing, and no other objective standards for determining when and in what amount they are to be imposed. Punitive awards thus imposed serve no valid state interest.<sup>16</sup> Under these circumstances, the state's legislature, or its courts through common law development, should be required to "replac[e] arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing [punishment]." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).<sup>17</sup>

<sup>16</sup> As the Court previously has declared, "[s]tates have no substantial interest in securing for plaintiffs gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349.

<sup>17</sup> See generally *United States v. Evans*, 333 U.S. 483, 486 (1948) ("In our system, so far at least as concerns the federal process, defining crimes and fixing penalties are legislative, not judicial functions."); *United States v. Batchelder*, 442 U.S. at 125-26 (discussing "the Legislature's responsibility to fix criminal penalties"); *Gregg v. Georgia*, 428 U.S. at 174 n.19 (plurality opinion) ("legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values").

In particular, the state's legislature or courts should be required to establish objective standards to guide and limit juries in determining when, and in what amounts, punitive awards may be imposed. At a bare minimum, if the state's legislature and courts choose to continue to abdicate that responsibility, punitive awards under that state's laws should be subjected to heightened judicial scrutiny under the Eighth Amendment.

## II. A PUNITIVE DAMAGES AWARD THAT EXCEEDS EVERY LEGISLATIVELY ESTABLISHED MAXIMUM CRIMINAL FINE AND CIVIL FINE, INCLUDING LEGISLATIVELY ESTABLISHED PUNITIVE DAMAGES, FOR LIKE CONDUCT IN THE SAME AND OTHER STATES VIOLATES THE PROPORTIONALITY REQUIREMENT OF THE EXCESSIVE FINES CLAUSE

Even when a state has specified limits on the punishments permitted for various forms of wrongful conduct and has thereby provided objective guidelines regarding proportionality, a punishment *within* those limits may nevertheless violate the Excessive Fines Clause. *Solem*, 463 U.S. 277. In deciding whether such a violation exists,

a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

*Solem*, 463 U.S. at 292.

Although that holding was articulated in the context of a proportionality analysis of a legislatively fixed maximum prison sentence, the principle that Eighth Amendment proportionality analysis should be guided by objective criteria applies with equal force to other forms of punishment, including civil fines. See *Solem*, 463 U.S. at



289 ("Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments" (quoting *Ingraham*, 430 U.S. at 664)). If, as occurred here, the punishment has been imposed under a system with no specified limit or guideline, it can overcome its presumptive excessiveness only if its relationship to the available objective criteria can be demonstrated under a heightened Eighth Amendment scrutiny.<sup>18</sup>

The sources of relevant objective criteria are plentiful. To analyze the proportionality of a punitive damages

<sup>18</sup> The court of appeals below did not consider the *Solem* proportionality criteria or any related criteria. Instead, because the punitive award was less than one percent of the defendants' net worth, the court concluded that the award "was not inconsistent with punitive damages levied in other jurisdictions against large corporations" and "was not motivated by prejudice." 845 F.2d at 410.

There is neither a retributive nor deterrent rationale for the court of appeals' approach. If a defendant is to be punished, it should be punished for the gravity of the misdeed (as roughly indicated, for example, by the harm caused or threatened), not for the fact of being large. Especially where the misdeed is a purely economic one, such as pricing activity, the defendant's status has no legitimate retributive role.

Nor is a larger penalty necessary for deterrence. The size of the penalty needed for deterrence is determined by reference to the expected gain from the specific misconduct. Because it is often enough the case that the defendant's expected gain is equal to the plaintiff's expected loss (theft cases being one example), it makes sense to use compensatory damages as a rough measure of expected wrongful gain and, accordingly, as the basis for the appropriate punitive damages awards. But no such theory of deterrence makes the size of the penalty awarded for deterrence turn on the defendant's wealth. To the contrary, in most instances, a penalty that, together with compensatory damages and other costs is sufficient to make the expected cost exceed the expected gain, will deter the undesirable conduct. *Cf. Smith v. Wade*, 461 U.S. at 94 (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"). That will be true regardless of the actor's wealth; General Motors is no more likely than a small, specialty-car manufacturer to engage in misconduct whose expected cost exceeds the expected gain.

award for a particular misdeed, a court can look to (1) the criminal fines imposed in other instances in the same and other jurisdictions; (2) civil fines authorized for similar conduct in the same state and in other states; (3) civil fines in the nature of legislatively fixed punitive damages awards (whether fixed dollar sums, fixed multiples of compensatory damages, or sums fixed in some other manner, such as by reference to reasonable attorney's fees) for similar and dissimilar conduct in the same state and in other states; and (4) punitive damages awards imposed by juries, and upheld by courts applying meaningful standards, for similar and dissimilar conduct in the same state.

To determine whether the \$6 million punitive damages award in this case is excessive under the Eighth Amendment, the Court need not decide whether a punitive damages award that exceeds any one, or even two or three, of these objective standards is excessive. That is because the award in this case exceeds *all* of them. The five charts attached as Appendices "A" through "E" to this brief demonstrate that the punitive damages award of \$6 million greatly exceeds every objective indicium of proportionality provided by the Vermont legislature, by other Vermont juries that have awarded punitive damages, and by every other legislature in the United States (including Congress) that has specified permissible punitive damages or criminal fines for antitrust conduct such as predatory pricing.<sup>19</sup>

<sup>19</sup> Appendix "A" shows that the Vermont legislature has specified various forms of limits on punitive damages awards for a wide variety of wrongful conduct. The \$6 million punitive award here is more than 100 times larger than the compensatory damages; yet the largest multiple that the Vermont legislature has specified is a punitive award ten times the sum wrongfully obtained by the defendants, and the largest dollar sum specified is \$10,000.

Similarly, Appendix "B" shows that the Vermont legislature has specified a wide variety of civil fines for a wide variety of wrongful conduct ranging from various fraudulent actions to dan-

Thus, to declare the award excessive, the Court need conclude only that, at a bare minimum, when a state establishes no predetermined maximum punitive damages that may be awarded for a particular type of misconduct and allows a jury unguided discretion to award whatever sum they might choose to award, a sum of punitive damages awarded for that misconduct violates the Excessive Fines Clause if it exceeds (1) the maximum legislatively established criminal fine for conduct of the same or similar gravity, (2) the maximum legislatively established civil fine for the conduct of the same or similar gravity, (3) the maximum legislatively fixed punitive damages awards for misconduct of the same or similar gravity; and (4) the maximum discretionary punitive damages award in a final judgment for conduct of the same or similar gravity in the same state.

In sum, the punitive damages judgment in this case vastly exceeds every legislatively established penalty,

gerous uses of radioactive material. The punitive award in this case is some 300 times larger than the largest civil fine for which a dollar maximum is specified.

Appendix "C" lists a wide variety of the legislatively established criminal fines in the State of Vermont. The punitive damages award in this case exceeds by millions of dollars, and by a multiple of more than 200, any specified fine for any nonviolent crime in the State of Vermont.

Appendix "D" shows that the punitive damages award in this case also vastly exceeds the legislatively specified maximum punitive damages for predatory pricing activity in every one of the forty-three states that specifies a measure of punitive damages for antitrust conduct. *See also* 15 U.S.C. § 15 (1982) (specifying treble damages and reasonable attorneys' fees as relief in antitrust actions).

Appendix "E" shows that the judgment also exceeded every reported prior punitive damages award, for every type of conduct, no matter how serious, how violent, or how harmful, in the history of the State of Vermont. *See, e.g., Greenmoss Builders, Inc.*, 143 Vt. 66, 461 A.2d 414 (punitive damages judgment of \$300,000 for libel).

civil or criminal, for any form of nonviolent wrongful conduct in the State of Vermont, and every legislatively established punitive damages award for the identical conduct—predatory pricing—in every state in the nation with a specified punitive damages award for that type of conduct. If the Excessive Fines Clause's prohibition of disproportionate fines is to have any significance, it must require reversal of that judgment.

### CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit affirming the district court's punitive damages judgment should be reversed.

Respectfully submitted,

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## APPENDICES



## APPENDIX A

LEGISLATIVELY SPECIFIED PUNITIVE DAMAGES  
FOR SPECIFIC FORMS OF CONDUCT IN VERMONT

Title and Section in Vermont Statutes Annotated	Description	Specified Punitive Damages
tit. 9, § 2311	Civil remedy for false checks	\$50, in addition to the amount of the check, court costs, bank fees, and attorney's fees
tit. 9, § 2361	Willful violation of motor vehicle financing laws	twice the total of finance charges under a contract made in willful violation of applicable provisions, in addition to reasonable attorney's fees, and the lender shall be barred from recovery of such charges
tit. 9, § 2409	Willful violation of retail installment sales laws	twice the total of the finance charges under a contract made in willful violation of the applicable provisions, in addition to reasonable attorney's fees, and the seller shall be barred from recovery of such charges
tit. 9, § 2461	Consumer fraud	exemplary damages not exceeding three times the value of the consideration given by the consumer
tit. 10, § 6242(c)	Illegal sale of mobile home park	greater of \$10,000 or 50% of gain realized in sale
tit. 10, § 6615(b)	Failure timely to comply with court order requiring removal of hazardous waste	three times the cost of removal
tit. 12, § 2152	Taking illegal costs or fees	ten times the excess

## APPENDIX B

## CIVIL FINES IN VERMONT

Title and Section in Vermont Statutes Annotated	Description	Civil Fine
tit. 1, § 618	Alteration of banks or bed of Connecticut river	"shall be fined" not more than \$5,000
tit. 2, § 255	Failure to register as a lobbyist	"shall be subject to a fine of" not more than \$500
tit. 3, § 809a	Failure to comply with subpoena issued by agency	not to exceed \$100
tit. 3, 2822(c) (4)	Violation of order of court under Environmental Conservation subsection	not less than \$100 and not more than \$10,000 for each violation
tit. 4, § 492	Willful failure by justice to deposit oath with town clerk	"may be fined" not more than \$100
tit. 4, § 958	Nonappearance of juror	"shall be fined" \$50
tit. 4, § 961	Willful misrepresentation on jury questionnaire	"may be fined" not more than \$50
tit. 5, § 65	Failure to pay tax to finance transportation board and agency of transportation	5% of tax not paid or \$10, whichever is greater, if tax is paid within 15 days after due; otherwise, 25% or \$50, whichever is greater; if fraudulent return is filed, 50% of amount due or \$20, whichever is greater
tit. 5, § 1819	Granting or knowingly consenting to special rebate or transportation rate	officer or employee: "shall be fined" not less than \$100 and not more than \$1,000 per company; not less than \$500 and not more than \$5,000

Title and Section in Vermont Statutes Annotated	Description	Civil Fine
tit. 5, § 2003	Transportation of radioactive materials	up to \$10,000 per day of violation
tit. 8, § 72(b)	Failure or refusal to produce documents or testify before banking and insurance commissioner	"may be fined" not more than \$1,000 per day of failure or refusal and six months suspension of authority to do business
tit. 8, § 558	Unlawfully doing business as or using names "bank," "banking association," "trust company"	"shall be fined" not more than \$500 per offense
tit. 8, § 1063	Violation of interstate banking rules	not less than \$1,000 nor more than \$10,000 per day
tit. 8, § 3662	Issuance of insurance policy following suspension of right to carry on insurance business	"shall be fined" not more than \$2,000 per policy
tit. 8, § 3368(c)	Transaction of insurance business without certificate of authority from commissioner	not less than \$50 nor more than \$1,000 per offense
tit. 8, § 3626	Advertising existence of insurance association for purpose of sale or solicitation of insurance	"shall be fined" not more than \$250 per offense
tit. 8, § 3661(2)	Violation of or non-compliance with insurance law requirements	"shall be fined" not more than \$2,000
tit. 8, § 3703	Discrimination in life insurance premiums charged, or related special favors or inducements	"may be fined" not more than \$500

Title and Section in Vermont Statutes Annotated	Description	Civil Fine
tit. 8, § 3861	Discrimination in fire and casualty insurance premiums charged, or related special favors or inducements	"shall be fined" not more than \$500
tit. 21, § 210	Labor safety	Up to \$20,000 for each employer who seriously or willfully violates, or for each employer who repeatedly violates, the Code or any rule, order, or regulation promulgated pursuant thereto
tit. 21, § 254	Fire safety and prevention	"shall be fined" up to \$1,000 for each violation, and not more than \$2,000 plus \$100/day for each failure to comply with any emergency order
tit. 8, § 4726	Unfair or deceptive insurance practices	"may be subject to a fine of" not more than \$500
tit. 9, § 2461	Injunction of prohibited acts of consumer fraud	not more than \$10,000 for each violation of the injunction
tit. 10, § 563(b)	Violation of confidentiality of air pollution records	"shall be fined" not more than \$100
tit. 10, § 555(c)	Violation of emissions reporting requirements	not more than \$100 per day
tit. 10, § 568	Violation of air pollution control laws generally	"shall be fined" not more than \$2,000
tit. 10, § 1025(a)	Violation of alteration of stream flow laws generally	"may be fined" not more than \$10,000 per day
tit. 10, § 6612(b)	Violation of laws governing hazardous waste management	not more than \$10,000 per day

Title and Section in Vermont Statutes Annotated	Description	Civil Fine
tit. 12, § 1623	Penalty for disobeying subpoena	not exceeding \$100 plus all costs of litigation incurred as a result of noncompliance
tit. 12, § 4916	Penalty when guilty of forcible entry or detainer	"fine" not exceeding \$10
tit. 14, § 105	Custodian or executor of will refuses to deliver or accept will or trust	\$10 for each month duty is neglected
tit. 18, § 130(6)	Violation of public health hazard provisions	not to exceed \$10,000 for each violation
tit. 32, § 7482(b)	Fraudulent failure to file tax return (estate and gift taxes)	\$25 for each month before proper return filed
tit. 32, § 7777(b)	Failure to pay assessment of tax deficiency by wholesale or retail dealer (cigarettes and tobacco products)	5% of assessment, for each month not paid in full, but not to exceed 25% of assessment
tit. 32, § 8147	Corporate officer makes false statement in tax return sworn to in another state (corporation taxes)	\$300
tit. 32, § 8910	Purchaser of motor vehicle willfully makes false statement on tax form furnished by commissioner (motor vehicle purchase and use tax)	not more than \$500



## APPENDIX C

## CRIMINAL FINES IN VERMONT

Title and Section in Vermont Statutes Annotated	Description	Fine
tit. 9, § 4238	Securities law violations	not more than \$10,000
tit. 9, § 4507	Discriminatory or unfair operation of public accommodations or housing practices	not more than \$1,000
tit. 10, § 1935(a)	Violation of laws governing underground storage tanks generally	not more than \$25,000
tit. 10, § 6612(a)	Violation of laws governing hazardous waste management	not more than \$25,000 per day
tit. 11, § 1031	Making of false statements by officers or directors concerning issuance of stock in business cooperative	not more than \$5,000
tit. 11, § 2204	Filing of false articles, statements, reports, etc. by directors and officers	not more than \$500
tit. 11, § 2754	Filing of false statements, articles, reports, etc. by directors and officers of non-profit corporation	not more than \$100
tit. 13, § 1101	Bribing public officers or employees	not more than \$5,000 if gift is less than \$500; not more than \$10,000 if gift is \$500 or more
tit. 13, § 1102	Public officers or employees accepting bribes	same as § 1101
tit. 13, § 1103	Bribing trier of causes	not more than \$1,000

Title and Section in Vermont Statutes Annotated	Description	Fine
tit. 13, § 1104	Trier of causes accepting bribes	not more than \$1,000
tit. 13, § 1105	Public Service Board members not to accept pay except from state	not more than \$1,000
tit. 13, § 1106	Demanding kickbacks for purchasing supplies	not more than \$5,000 if kickback is less than \$500; not more than \$10,000 if kickback is \$500 or more
tit. 13, § 1107	Demanding kickbacks for license	same as § 1106
tit. 13, § 1108	Demanding kickbacks as agent of private corporation	same as § 1106
tit. 13, § 1801	Forgery and counterfeiting documents	not more than \$1,000
tit. 13, § 1802	Uttering a forged instrument	not more than \$1,000
tit. 13, § 1804	Counterfeiting paper money	not more than \$1,000
tit. 13, § 1806	Affixing false signature to obligation of corporation	not more than \$1,000
tit. 13, § 2005	False advertising	not more than \$1,000
tit. 13, § 2006	False statement as to financial ability	not more than \$1,000
tit. 13, § 2022	Bad checks	not more than \$1,000, plus restitution of amount of check, and \$5 service fee.
tit. 13, § 2531	Embezzlement generally	not more than \$500
tit. 13, § 2532	Embezzlement by officer or servant of incorporated bank	not more than \$1,000
tit. 13, § 2533	Embezzlement by receiver or trustee	not more than \$1,000

Title and Section in Vermont Statutes Annotated	Description	Fine
tit. 13, § 2534	Embezzlement by executor or administrator	not more than \$1,000
tit. 13, § 2535	Embezzlement by guardian	not more than \$1,000
tit. 13, § 2582	Theft of services	not more than \$1,000 if the value of the services is \$500 or less; not more than \$5,000 if the value of the services is more than \$500
tit. 13, § 2901	Perjury and subornation of perjury	not more than \$10,000
tit. 32, § 10010(a) and (b)	Willful evasion of tax	not more than \$10,000 or 5 times the amount of the tax defeated or evaded, whichever is larger
tit. 32, § 10105(a)	Willful failure to pay tax liability by generator	fine of not more than \$5,000

## APPENDIX D

## STATE ANTITRUST PRIVATE REMEDIES

STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
Alabama	Ala. Code § 6-5-60 (1977)	all actual damages plus \$500 in each instance of injury or damage
Alaska	Alaska Stat. § 45.50 576 (1986)	treble damages for willful violations, plus costs of the suit, including reasonable attorney's fees
Arizona	Ariz. Rev. Stat. Ann. § 44-1408 (1987)	up to three times the damages sustained, plus taxable costs and reasonable attorney's fees
California	Cal. Bus. & Prof. Code § 16750 (West Supp. 1988)	treble damages, interest from the date of service of the complaint, reasonable attorney's fees, and costs of suit
Colorado	Colo. Rev. Stat. § 6-2-111 (1973)	treble damages for unfair practices in violations of sections 6-2-103 to 6-2-108 or 6-2-110 (discriminatory sales, secret rebates, and sales below cost)
Connecticut	Conn. Gen. Stat. § 35-35 (1987)	treble damages, reason- able attorney's fees, and costs
Florida	Fla. Stat. § 542.22 (1988)	treble damages and costs of suit, including reasonable attorney's fees
Hawaii	Haw. Rev. Stat. § 480-13 (Supp. 1987)	treble damages or \$1,000, whichever is greater, and reason- able attorney's fees together with costs of suit

STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
Idaho	Idaho Code § 48-114 (1977)	treble damages and costs of suit, including reasonable attorney's fees
Illinois	Ill. Rev. Stat. ch. 38, para. 60-7 (1987)	treble damages for violations of subsections 3(1) or 3(4) of Anti-trust Act, Ill. Rev. Stat. ch. 38, para. 60-3, or, at the court's discretion, for willful violation of subsections 3(2) or 3(3), together with costs and reasonable attorney's fees
Indiana	Ind. Code § 24-1-2-7 (1982)	treble damages together with costs of suit, including reasonable attorney's fees
Iowa	Iowa Code § 553.12 (1987)	actual damages and reasonable attorney's fees, plus, at the court's discretion, exemplary damages that do not exceed twice the amount of actual damages
Kansas	Kan. Stat. Ann. § 50-801 (1983)	treble damages, plus reasonable attorney's fees and costs
Kentucky	Ky. Rev. Stat. Ann. § 365.070 (Michie/Bobbs-Merrill 1987)	treble damages (discriminatory sales, sales below cost, and unfair trade practices)
Louisiana	La. Rev. Stat. Ann. § 51:137	treble damages, costs of suit, and reasonable attorney's fees
Maine	Me. Rev. Stat. Ann. tit. 10, § 1104 (Supp. 1987)	treble damages, costs of suit, including necessary and reasonable investigative costs, reasonable experts' fees, and reasonable attorney's fees

STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
Maryland	Md. Com. Law Ann. § 11-209(b) (4) (1983)	treble damages, costs, and reasonable attorney's fees
Massachusetts	Mass. Gen. L. ch. 93, § 12 (1984)	up to three times the amount of actual damages caused by violations committed with malicious intent to injure, together with costs of suit, including reasonable attorney's fees
Michigan	Mich. Comp. Laws § 445.778 (Supp. 1988)	up to three times actual damages caused by a flagrant violation, plus interest on the damages from the date of the complaint, taxable costs, and reasonable attorney's fees
Minnesota	Minn. Stat. § 325D.57 (1986)	treble damages, together with costs and disbursements, including reasonable attorney's fees
Mississippi	Miss. Code Ann. § 75-21-9 (1972)	all damages, plus \$500 in each instance of injury
Missouri	Mo. Rev. Stat. § 416.121 (1979)	treble damages, reasonable attorney's fees, and costs of suit
Montana	Mont. Code Ann. § 30-14-222	treble damages
Nebraska	Neb. Rev. Stat. § 59-821 (1984)	actual damages or liquidated damages and costs of suit, including reasonable attorney's fees
Nevada	Nev. Rev. Stat. § 598A.210 (1987)	treble damages, reasonable attorney's fees, and costs
New Hampshire	N.H. Rev. Stat. Ann. § 356:11 (1984)	up to three times the actual damages, if the violation is willful or flagrant, plus costs of suit and reasonable attorney's fees



STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
New Jersey	N.J. Rev. Stat. § 56:9-12 (Supp. 1988)	treble damages, reasonable attorney's fees, filing fees, and reasonable costs of suit, including, but not limited to, the expenses of discovery and document reproduction
New Mexico	N.M. Stat. Ann. § 57-1-3 (1987)	up to three times actual damages, and costs and attorney's fees
New York	N.Y. Gen. Bus. Law § 340 (McKinney 1988)	treble damages, costs not exceeding \$10,000 and reasonable attorney's fees
North Carolina	N.C. Gen. Stat. §§ 75-16 and 75-16-1 (1987)	treble damages, and attorney's fees in selected instances
North Dakota	N.D. Cent. Code § 51-08.1-08	up to three times the damages sustained, if the violation is flagrant, taxable costs and attorney's fees
Ohio	Ohio Rev. Code Ann. § 1331.08 (Baldwin 1987)	double damages and costs of suit
Oklahoma	Okla. Stat. tit. 79, § 25 (1987)	treble damages, costs of suit, and reasonable attorney's fees
Oregon	Or. Rev. Stat. § 646.780 (1987)	treble damages and costs of suit, including necessary reasonable investigative costs and reasonable experts' fees, and reasonable attorney's fees at trial
Rhode Island	R.I. Gen. Laws § 6-36-11(a) (1956)	treble damages, reasonable costs of suit, including, but not limited to, the expenses of discovery and document reproduction, and reasonable attorney's fees

STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
South Carolina	S.C. Code Ann. § 39-5-140 (Law. Co-op. 1985)	treble damages, reasonable attorney's fees and costs for willful or knowing use of unfair competitive methods
South Dakota	S.D. Codified Laws Ann. § 37-1-14.3 (1986)	treble damages, taxable costs, and reasonable attorney's fees
Texas	Tex. Bus. & Com. Code Ann. § 15.21 (Vernon 1987)	actual damages, plus interest from the date of service of the complaint, or treble damages, if the conduct was willful or flagrant, and costs of suit, including reasonable attorney's fees
Utah	Utah Code Ann. § 76-10-919(1) (Supp. 1987)	treble damages, costs of suit, and reasonable attorney's fees
Virginia	Va. Code Ann. § 59.1-9.12 (1987)	up to three times the actual damages, if the violation was willful or flagrant, costs of suit and reasonable attorney's fees
Washington	Wash. Rev. Code § 19.86.090	up to three times the actual damages, in the court's discretion, together with costs of suits including reasonable attorney's fees
West Virginia	W. Va. Code § 47-18-9 (1986)	treble damages, attorney's fees, and reasonable costs
Wisconsin	Wis. Stat. § 135.18 (Supp. 1988)	treble damages, costs of suit, and reasonable attorney's fees

## APPENDIX E

## VERMONT PUNITIVE DAMAGE CASES

Case	Award	Cause of Action
1. <i>Crabbe v. Veve Assoc.</i> , 549 A.2d 1045 (Vt. 1988)	\$30,000	land developer permanently obstructed easement
2. <i>Coty v. Ramsey Assoc.</i> , 546 A.2d 196 (Vt. 1988)	\$80,000 <sup>1</sup> \$150,000 \$150,000	nuisance
3. <i>Furno v. Pignona</i> , 522 A.2d 740 (Vt. 1986)	\$10,000	breach of contract and unlawful termination
4. <i>Poulin v. Ford Motor Co.</i> , 517 A.2d 1168 (Vt. 1986)	[\$40,000] <sup>2</sup>	violation of express and implied misrepresentation; violation of the Consumer Fraud Act
5. <i>Appropriate Technology Corp. v. Palma</i> , 508 A.2d 724 (Vt. 1986)	\$12,480	breach of contract and fraud
6. <i>Solomon v. Atlantis Dev. Inc.</i> , 516 A.2d 132 (Vt. 1986)	\$2,500	slander
7. <i>Murray v. J&amp;B Int'l Trucks, Inc.</i> , 508 A.2d 1351 (Vt. 1986)	\$5,000	conversion
8. <i>A.M. Varityper Div. of A.M. Int'l, Inc. v. Rabbo</i> , 505 A.2d 671 (Vt. 1986)	\$4,000	conversion

<sup>1</sup> Three awards for three plaintiffs.<sup>2</sup> Total award, punitives not separately stated.

Case	Award	Cause of Action
9. <i>Ball v. Barre Elec. Supply Co.</i> , 499 A.2d 787 (Vt. 1983)	unspecified	breach of contract; wrongful discharge
10. <i>Lent v. Huntoon</i> , 470 A.2d 1162 (Vt. 1983)	\$25,000	defamation
11. <i>Glidden v. Skinner</i> , 458 A.2d 1142 (Vt. 1983)	\$25,000	breach of contract
12. <i>Birkenhead v. Coombs</i> , 465 A.2d 244 (Vt. 1983)	\$750	intentional infliction of emotional distress
13. <i>Greenmoss Builders, Inc. v. Dun &amp; Bradstreet, Inc.</i> , 461 A.2d 414 (Vt. 1983) <i>aff'd</i> , 472 U.S. 749 (1985)	\$300,000	defamation
14. <i>Dean v. Arena</i> , 450 A.2d 1143 (Vt. 1982)	\$500	trespass
15. <i>Pezzano v. Bonneau</i> , 329 A.2d 659 (Vt. 1974)	\$7,500	conversion
16. <i>Dunbar v. Gabaree</i> , 330 A.2d 89 (Vt. 1974)	unspecified	assault and battery
17. <i>Allard v. Ford Motor Credit Co.</i> , 422 A.2d 940 (Vt. 1980)	\$1,000 (reversed)	conversion; wrongful repossession
18. <i>Gaylord v. Hoar</i> , 165 A.2d 258 (Vt. 1960)	\$200	conversion
19. <i>Parker v. Hoefer</i> , 100 A.2d 434 (Vt. 1953)	unspecified	alienation of affections and criminal conversion
20. <i>Gray v. Janicki</i> , 99 A.2d 707 (Vt. 1953)	\$500	tort for assault and battery

**AMICUS CURIAE**

**BRIEF**



10  
No. 88-556

Supreme Court, U.S.  
FILED

JAN 19 1989

JOSEPH E. SPANIOLO, JR.  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., AND  
BROWNING-FERRIS INDUSTRIES, INC.,

*Appellants*

v.

KELCO DISPOSAL, INC. AND JOSEPH KELLEY,

*Appellees*

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**BRIEF OF AMICI CURIAE  
BETHLEHEM STEEL CORPORATION  
AND ATLANTIC LEGAL FOUNDATION  
IN SUPPORT OF APPELLANTS**

---

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**QUESTION PRESENTED**

Whether a punitive damage award of \$6,000,000, more than 100 times the compensatory damages of \$51,146, awarded by the jury in a commercial case involving a business tort and causing only economic injury, and in which the jury was instructed merely that in assessing punitive damages it could "take into account the character of the defendants, their financial standing and the nature of their acts." (C.A. App. 1180) is excessive under the Eighth Amendment and a violation of defendants' Fourteenth Amendment due process rights.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

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No. 88-556

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Browning-Ferris Industries of Vermont, Inc.  
and Browning-Ferris Industries, Inc.,  
Appellants,  
v.  
Kelco Disposal, Inc., Inc. and Joseph Kelley,  
Appellees.

---

**BRIEF OF AMICI CURIAE  
BETHLEHEM STEEL CORPORATION  
AND ATLANTIC LEGAL FOUNDATION, INC.  
IN SUPPORT OF APPELLANTS**

---

**INTEREST OF AMICI\***

This case concerns the issue whether the constitutional safeguards against excessive fines and guaranteeing due process are to be accorded defendants in civil lawsuits involving claims for punitive damages where the jury receives little guidance from the law or the trial court as to the factors to be

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\* Pursuant to Rule 36 of the Rules of this Court, letters from counsel of record for the parties evidencing their consent to the filing of this brief have been filed with the Clerk of the Court.

considered in awarding and assessing punitive damages, and where, as a result, the punitive damage award is monumentally greater than the compensatory damages assessed by the jury. This extreme disparity between compensatory and punitive damages awards has become more common as juries in civil, commercial cases have made increasingly extravagant punitive damage awards with much greater frequency over the last decade.

*Amicus* Bethlehem Steel Corporation is one of the largest domestic producers of steel and steel products. It is also engaged in mining, construction and repair of steel structures such as off-shore drilling platforms, and ships. As such, it is potentially exposed to claims for punitive damages in product liability and commercial lawsuits.

*Amicus* Atlantic Legal Foundation, Inc. is a not-for-profit tax exempt legal foundation, incorporated in Pennsylvania. It is a public interest law firm whose mandate is to present balanced articulation of the public interest in litigations with broad impact and constitutional law significance, such as the instant case. The Foundation has appeared as *amicus* before this Court in a number of cases involving public interest issues, and submits this brief to assist the Court in its determination of the significant questions presented on this appeal.

**SUMMARY OF ARGUMENT**

Punitive damages are intended to punish the tortfeasor and to deter the defendant and others from committing the same or similar torts in the future. Consequently, punitive

damages are penal in nature, in that they perform the same functions as penalties inflicted upon persons convicted of crimes. As a penal instrument, therefore, punitive damages should, as a matter of logic, principle and constitutional doctrine, be subject to the Excessive Fines clause of the Eighth Amendment. Punitive damages ought to bear a reasonable relationship in amount to the actual harm suffered by the injured party. Measured by the standards of that Clause as applied in criminal and quasi-criminal proceedings, the punitive damages assessed in this case are excessive.

Because punitive damages are penal or quasi-criminal in nature, defendants in civil cases who are potentially liable for punitive damages should be accorded at least some of the basic Due Process protections of the Fourteenth Amendment. Substantively, these would include a clear definition of the outer limit of potential punishment, clearly defined criteria for imposing liability for punitive damages, a requirement that the amount of punitive damages be proportional to the actual injury inflicted, and that the ratio of punitive to compensatory damages be limited. In addition, procedural safeguards designed to enhance the ability of the trial court to prevent prejudice and irrationality from influencing the jury's determination as to liability for, and the quantum of, punitive damages must be mandated. These would include bifurcating the trial, so that the issue of punitive damages will be tried only after liability for and the amount of compensatory damages has been decided, and requiring careful instructions be given to the jury on the factors and limitations they should consider in assessing punitive damages.

## ARGUMENT INTRODUCTION

Punitive damage awards of enormous proportions have become increasingly common. In the last three years, this Court has had before it on appeal or by petition for certiorari several cases in which punitive damages of more than a million dollars have been assessed by juries for a variety of torts. In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), involving a bad faith insurance claim, the actual damages were \$1,378, and the punitive damages awarded by the jury and upheld by the Alabama Supreme Court were \$3.5 million. In *Bankers Life and Casualty Co. v. Crenshaw*, 108 S.Ct. 1645 (1988), compensatory damages for refusal to honor an insurance policy were found by the jury to be \$20,000, and punitive damages of \$1,600,000 were assessed. In *Hodder v. The Goodyear Tire & Rubber Company*, 426 N.W.2d 826 (Minn. 1988), *pet. for cert.* filed October 14, 1988 (No. 88-626), the jury awarded approximately \$3.4 million in compensatory damages and \$12.5 million in punitive damages on a theory the court rejected; the court itself reduced the punitive damages to \$4 million, but on a novel theory not alleged by plaintiff. In *April Enterprises v. Metromedia, Inc.*, No. B022890 Cal Ct. App., June 9, 1988, (unpublished opinion), *pet. for cert.* filed October 14, 1988, the jury awarded, and the California appellate court affirmed, a punitive damages judgment of \$14 million for the "tort" of "dealing in bad faith," perhaps the most egregious example of "tortification" of a breach of contract claim. In the case at bar, actual damages were found to be only \$51,146, but punitive damages of \$6 million were awarded for tortious interference



with business relations.

These cases are merely the tip of an iceberg. A veritable multitude of cases in the state courts and in the lower federal courts, which have not reached this Court, have resulted in punitive damages of tens of millions of dollars on similar business-related claims. Multi-million dollar punitive damage verdicts, almost unheard of twenty years ago and noteworthy for their rarity even ten years ago (*see, e.g., Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 Univ. Chicago L. Rev. 1, 2-6 (1982)), have become almost common now. *See, e.g., Jeffries, A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 143-145 (1986).

These punitive damage verdicts are unpredictable, and based on uncertain and largely subjective criteria. In permitting juries to exercise virtually unfettered discretion, trial and appellate courts have sanctioned juries meting out punishment on a random, *ad hoc* basis, without legislative or consistent appellate guidance. The result is the imposition of penal sanctions without the safeguards accorded in criminal prosecutions, but with consequences to the defendant that can be immensely more severe than the maximum fine in analogous criminal proceedings.

The lure of windfall punitive damages has led to a distortion of our jurisprudence, enticing plaintiffs' attorneys (and sympathetic judges) to create tort causes of action, for which punitive damages are often available, out of contract or other types of cases in which punitive damages are not usually allowed.

The impact of enormous punitive damage awards has also had a decided effect throughout the economy. It has contributed to the "liability insurance crisis", which makes insurance unavailable or prohibitively expensive not only to large manufacturing companies, but to smaller enterprises, municipalities and individuals.<sup>1</sup> It has also led to a decline in industrial innovation, to the elimination or curtailment of certain municipal services (such as parks, playgrounds, school sports teams and other recreational activities) and other unintended consequences. The costs of punitive damages, most often assessed against corporations, are, of course, passed on to the community at large in the form of higher prices. This, in turn, has put American manufacturers at a competitive disadvantage vis a vis foreign counterparts.

This Court has recognized that the constitutional limits of punitive damages "raise important issues which, in an appropriate setting, must be resolved." *Aetna Life Ins. Co. v. Lavoie*, *supra*, at 828-829. More recently, in *Bankers Life and Casualty v. Crenshaw*, *supra*, at 1651, the Court wrote that the constitutional challenge to excessive punitive damages "is a question of some moment and difficulty." By granting *certiorari* in the case at bar, the Court now has an opportunity to address those important issues and to give guidance to state and federal courts on the constitutional parameters of punitive damages.

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<sup>1</sup> We are aware, of course, that not all states permit insurance coverage for punitive damages. As of 1988, 25 states did permit such coverage, 17 did not, and the issue was undecided in eight. *See* Schinerb, Blatt, Hammesfahr and Nugent, *Punitive Damages* 37 (1988).

**PUNITIVE DAMAGES ARE SUBJECT TO THE  
PROTECTIONS AFFORDED BY THE EIGHTH  
AND FOURTEENTH AMENDMENTS**

Punitive damages "are not compensation for injury. Instead they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Punitive damages are the civil counterpart of criminal fines. They "serve the same function as criminal penalties and are in effect private fines." *Rosenbloom v. Metromedia*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting). They are "quasi-criminal" and "punitive fine[s]" that "provide a windfall to plaintiffs." *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

Punitive damages fit the criteria enumerated by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963) for determining whether a sanction is punitive and bounded by the due process protections usually afforded in criminal proceedings.<sup>2</sup> These criteria were more recently cited with approval by this Court in *United States v. Ward*, 448 U.S. 242, 249-251 (1980). It has been contended that punitive damages in civil cases meet all seven criteria. See, Grass, *The*

<sup>2</sup>. The criteria are: "[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been considered as punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment--retribution and deterrence, [5] whether the behavior...is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned...." 372 U.S. at 168-169 (footnotes omitted).

*Penal Dimensions of Punitive Damages*, 12 Hastings Const. L. Q. 241 (1985). Other commentators, while believing that punitive damages meet only criteria [2] through [6], nevertheless conclude that constitutional constraints apply. See, Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983).

In *Ingraham v. Wright*, 430 U.S. 651 (1977), this Court, while holding that the Cruel and Unusual Punishment Clause of the Eighth Amendment did not apply to corporal punishment of pupils by school authorities, stated "Some punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments \* \* \* to justify application of the Eighth Amendment." 430 U.S. at 669, n.37. In *Trop v. Dulles*, 356 U.S. 86, 96 (1958) this Court applied the Eighth Amendment to the attempt by the government to extradite a soldier convicted of desertion, because the statute in question was "technically not a penal law." 356 U.S. at 94. That argument was rejected, this Court holding that "The inquiry must be directed to the substance" and not merely the "form" of the action. 356 U.S. at 94, 95 (plurality opinion) and if either a statute or common law "imposes a disability for the purposes of punishment--that is to reprimand the wrongdoer, to deter others, etc.--it has been considered penal." *Id.* at 96. Compare *United States v. Ward*, 448 U.S. 242 (1980) in which this Court, again applying the "substance over form" analysis, held that a statute that imposed a \$500 fine for water pollution was not sufficiently penal to warrant the "procedural guarantees normally associated with criminal prosecutions." (448

U.S. at 254) because the fines were used to finance cleanup and defray the costs of administering the Water Pollution Control Act. (448 U.S. at 246).

Applied to punitive damages, the *Mendoza-Martinez* criteria and the "substance over form" approach clearly require the conclusion that punitive damages, both in origin and in current application, are penal and at least quasi-criminal in nature, and thus deserving of many constitutional safeguards. As Justice Marshall observed, in a concurring opinion, punitive damages are indisputably "punishment for past conduct," and should be subject to the Excessive Fines clause. *City of Yonkers v. United States*, No. A-175 (Sep. 1, 1988) (Slip. op. issued in companion applications in *Spallone v. United States*, Nos. A-172, A-173, A-174 and A-175 (Sep. 1, 1988)). In addition, we submit that the virtually unlimited discretion of juries to award punitive damages does "violate the Due Process Clause," as noted by Justice O'Connor, joined by Justice Scalia, concurring in *Bankers Life*, *supra*, 108 S.Ct. at 1655, and that "the grant of wholly standardless discretion to determine the severity of the punishment appears inconsistent with due process." *Id.*, at 1656.

## II

### THE CONSTITUTIONAL PARAMETERS OF PUNITIVE DAMAGES

In order to be consistent with the constitutional requirements of the Eighth Amendment's prohibition of Excessive Fines and the Fourteenth Amendment's guarantees of procedural and substantive Due Process, the approach to

punitive damages now commonplace in state and federal courts must be revised both procedurally and substantively.

The substantive reforms fall principally in the area of imposing limits on the amount of punitive damages that can be levied. As this Court held in *Solem v. Helm*, 463 U.S. 277 (1983), the Eighth Amendment incorporates the notion of proportionality (in that case the principle was applied to punishments under the Cruel and Unusual Punishments Clause). The concept of proportionality was certainly done violence by the jury in the case at bar, which exacted a punishment more than 100 times the actual injury.

The limitless character of punitive damages also runs afoul of the Due Process Clause. There is no distinction in principle between "civil" punitive damages and "criminal" fines, and the different labels are of no moment. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966); see, *Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977). Penalties which "do not state with sufficient clarity the consequences of violating a given criminal statute" pose serious constitutional questions. *United States v. Botchelder*, 442 U.S. 114, 123 (1979).

The purposes of punishment and deterrence can and should be achieved without unlimited and unguided punitive damages. Analogous statutory penalties, deemed by the legislature sufficient to achieve the desired deterrent effect, are commonly treble the actual injury plus reasonable attorneys fees. Compare, the damages available under the antitrust laws (see, 15 U.S.C. Sec. 15) and RICO (see, 18 U.S.C. Sec. 1964(c)). We recognize, however, that no fixed ceiling or even a fixed ratio of punitive damages to compensatory damages is adequate in every case if deterrence is to be achieved. (For



example, a large corporation or wealthy individual is less likely to be deterred by punitive damages that are treble actual damages of \$10,000 than would a small company or an individual of average means). We propose, therefore, that judges and juries be given guidance that punitive damages more than three times actual damages be viewed with extreme caution, and be considered only in unusual cases, where the plaintiff can prove either that the conduct of the wrongdoer is so egregious as to warrant the strongest reproof, or that the economic resources of the defendant are so great that a treble damage award would be inconsequential. See, American Bar Association Section of Litigation Special Committee on Punitive Damages *Punitive Damages: A Constructive Examination* at 8-3 (1986).

The threshold of culpable behavior deserving of being penalized by punitive damages also must be clearly distinct from wrongful conduct which incurs only compensatory damages, and must be clarified. At present, the "standards" are vague, unduly flexible and inconsistent, and thus run afoul of due process requirements of predictability and certainty. See, J. Sales, *Punitive Damages: The Product Of A By-Gone Era*, sec. 4(A). A standard requiring intent (scienter) or at least callous disregard or flagrant indifference to the consequences of acts is necessary to impose the penal sanction of punitive damages.

Procedurally, still greater care must be taken, and more far-reaching reform is required. First, the trial court must be vigilant and strict about preventing plaintiffs' counsel from appealing to the bias or irrationality (usually characterized as "passion or prejudice") of the jury. In this case, the record

clearly shows that plaintiff's attorney played on sectional prejudices in his repeated exhortation to the jury to "send a message back to Houston" (see, Petitioners' Appendix to their Petition for Certiorari, at 30a, 32a, 33a, 34a). Such appeals to regional biases are no more permissible than appeals to racial, religious or ethnic prejudice.

Emotional factors can also take on excessive weight in some cases, particularly those resulting in personal injury. The gravity of the injury, while clearly relevant to the issue of compensatory damages, is not directly relevant to the amount of punitive damages (indirectly, of course, it is, under our suggestion for using a multiplier of compensatory damages to limit punitive damages).

Because the remedy of punitive damages is half way between civil and criminal law, see, Restatement (Second) of Torts, sec. 908 (1) and comment a (1979), imposition of punitive damages should require clear and convincing proof, a lower standard than proof beyond a reasonable doubt, but a higher threshold than a preponderance of the evidence standard for finding liability and awarding compensatory damages. Considering different standards of proof (and different degrees of fault) is probably too complex a task for a jury to carry out simultaneously and adequately. While the trial court should have some discretion in particular cases, in general bifurcation of trials into liability and compensatory damages in one phase and punitive damages in the second phase would be appropriate. Such an approach would also minimize the potential prejudice incurred in the liability phase when there are repeated references to the egregiousness of

defendant's conduct, or defendant's wealth.<sup>3</sup> Evidence of defendant's wealth or other matters relevant only to the question of punitive damages should be admitted only after the issues of liability for and the amount of compensatory damages have been decided.

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<sup>3</sup> It has been suggested that a more effective barrier to the prejudicial impact of evidence relevant only to punitive damages on the liability and compensatory damages issues would be to give judges alone the authority to determine the amount of punitive damages. See, Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 Chicago L. Rev. 1, 52 (1982). This would be entirely consistent with the criminal law model, in which the jury decides guilt, but the judge (guided by statute) decides on punishment.

## CONCLUSION

Punitive damages are penalties which are imposed for the purpose of punishing and deterring egregious and socially harmful behavior. A central motive of the Constitution is to protect persons against unduly burdensome, unrestrained or arbitrary and capricious penalties. Punitive damages are the "civil" analog of criminal fines, and are subject to the constitutional limitations of the Excessive Fines and Due Process Clauses. The unfettered power of juries to impose enormous punitive damage fines does not comport with these fundamental protections, and must be constrained by rules of law which do comply with these constitutional mandates.

January 19, 1989

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**AMICUS CURIAE**

**BRIEF**



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No. 88-556

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC.,  
and BROWNING-FERRIS INDUSTRIES, INC.,  
*Petitioners,*

v.

KELCO DISPOSAL, INC., and JOSEPH KELLEY,  
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

BRIEF AMICI CURIAE OF GOLDEN RULE INSURANCE  
COMPANY, ALLSTATE INSURANCE COMPANY, AND  
FIREMAN'S FUND INSURANCE COMPANY

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### QUESTIONS PRESENTED

1. Whether the Excessive Fines Clause of the Eighth Amendment, especially in light of the history of its lineal antecedents in the English Bill of Rights of 1689 and Magna Carta, applies to control the excessiveness of punitive fines imposed in punitive damage actions.

2. Whether a punitive fine imposed in a punitive damage action is constitutionally excessive if it exceeds the maximum punishment prescribed by the pertinent legislature for similar conduct.

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BRIEF OF GOLDEN RULE INSURANCE COMPANY,  
ALLSTATE INSURANCE COMPANY, AND  
FIREMAN'S FUND INSURANCE COMPANY AS  
AMICI CURIAE

## INTEREST OF AMICI

This case concerns the questions whether the Excessive Fines Clause of the Eighth Amendment is to be applied as a restraint on the size of punitive damage awards and, if so, whether the Court shall adopt a principled, easily administered test for excessiveness based upon a comparison between the punitive damage award and the monetary punishments prescribed by the legislature for similar conduct. In imposing large and completely unpredictable punitive damage awards such as the extravagant award in this case, civil juries function with unfettered discretion to decide whether defendants, who often are insurance companies, should be punished and to what extent. The presumed wealth of insurance companies and other corporate defendants such as petitioners in this case is frequently placed before juries, thereby encouraging juries to base their otherwise unfettered and unguided punishment decision on the existence of a deep pocket.

In authorizing civil juries to perform this role, the States are implementing a system of punitive justice on an *ad hoc* basis, establishing through jury verdicts substantive standards of conduct and levels of punishment which have never been subjected to meaningful legislative consideration. The result of this random process is a penal justice system which functions without clear prospective standards. Indeed, the only certainty in this system is that a confiscatory punitive award may be imposed for virtually any mistake made in the processing of an insurance claim.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), amicus Golden Rule Insurance Company appeared as amicus in this Court and argued that frequent articu-

lation in punitive damage cases of new substantive standards of conduct and retroactive imposition of those standards to sustain massive punitive damage awards makes it virtually impossible for a small insurance company to be sure that it can survive.

In *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988), Golden Rule, joined by amici Fireman's Fund Insurance Company and Allstate Insurance Company, argued to this Court that the history of the Excessive Fines Clause, which traces its roots directly to Chapters 20-22 of Magna Carta, strongly supports the applicability of that Clause to punitive damage awards in civil cases and demonstrated that the system for imposing monetary punishment that existed under Magna Carta also provides a principled means for determining whether a particular punitive damage award is unconstitutionally excessive. They renew these arguments in this case.

Amici collectively conduct their insurance businesses in all fifty States. Each day they process thousands of insurance claims, and in most jurisdictions each disputed claim processed could result in an arbitrary and excessive punitive damage award because of a jury's determination, made at trial years after the events underlying a lawsuit occurred, that a claim should have been paid sooner or in a larger amount. The massive reallocation of society's resources that occurs with each jury's verdict and with increasingly larger settlements driven by the prospect of unlimited punitive damages raises social and economic issues of signal importance that have, for the most part, not been addressed directly by the bodies most capable of doing so—the legislatures of the several States.

Absent the constitutional protection from excessive punitive damage awards provided by the Excessive Fines Clause, amici and similarly situated defendants are being deprived of rights that have been accorded in England since Magna Carta. If, as the Court stated in *Solem v. Helm*, 463 U.S. 277, 285-86 n.10 (1983), the Eighth

Amendment provides at least the same "liberties and privileges" available under the lineal antecedents of the Eighth Amendment—including the amercements clauses of Magna Carta—then all defendants in punitive damage cases should also be entitled to those liberties and privileges, one of which was freedom from arbitrary and excessive fines.

### STATEMENT OF THE CASE

Amici adopt petitioners' statement of the case. Only two additional points should be emphasized.

First, the \$6,000,000 penalty imposed by the jury is part of a governmental system of punishments that are inflicted on an *ad hoc* basis at the instance of private litigants whose private coffers are enriched proportionally to the amount of punishment they can convince a jury to impose in any particular case. This case is not about the liability of a private party for injuries caused by its conduct. It is about governmental punishments. However aberrational in practice, punitive damages/civil fines are part of a government program to affect, at least in theory, behavior through selective punishments.

Second, the punitive damage/civil fine system is characterized by the same qualities listed by Blackstone as the very definition of injustice and inhumanity: disproportionality, uncertainty and arbitrariness. Not unlike the system of corporate punishments eventually abolished in England, punitive damages/civil fines are "[p]unishments of unusual severity, especially when indiscriminately inflicted . . . ." 4 W. Blackstone, *Commentaries on the Laws of England* \*16-17 (1768).

### SUMMARY OF ARGUMENT

Since the Excessive Fines Clause of the Eighth Amendment was ratified on December 15, 1791, this Court has never had occasion to consider and apply that Clause to



an "excessive fine." Thus, this Court has never determined what the Framers of the Bill of Rights meant by the word "fine" or what would constitute an "excessive" fine. This Court's decisions have, however, established two principles that are deeply implicated in this case. The first principle is that the Clauses of the Eighth Amendment often associated with punishments imposed at the conclusion of criminal proceedings—the Excessive Bail and Cruel and Unusual Punishments Clauses—are applicable to detention or punishment imposed outside of the formal criminal process. *Carlson v. Landon*, 342 U.S. 524 (1952) (bail); *Trop v. Dulles*, 356 U.S. 86 (1958) (punishment). The second principle is that the Eighth Amendment embodies the concept that punishments must not be disproportionate to the offense, a principle which this Court, in *Solem v. Helm*, *supra*, traced to and derived from the amercements clauses of Magna Carta.

In this case, the \$6,000,000 punitive award at issue was imposed for the sole purpose of punishing, rather than compensating, petitioners. As articulated by the court below, the jury was authorized to impose an award in any size it deemed adequate to exact society's retribution for the conduct at issue and to deter petitioners and other similarly situated persons from engaging in similar conduct. Thus, the purposes of this award are to fulfill the historical purposes of the criminal law—punishment and deterrence. *Trop v. Dulles*, 356 U.S., at 96 (Warren, C.J.) (plurality opinion).

Because they are intended to punish and deter, punitive damage awards are functionally and legally indistinguishable from monetary awards imposed in like circumstances under English common law for more than seven centuries. Monetary awards designed to punish and deter a wrongdoer were known as "wites" in pre-Norman days, "amercements" for about six centuries after the Norman Conquest, and "fines" or "exemplary damages" thereafter. However denominated, these monetary impositions over

the centuries came to be controlled in England by legal principles pursuant to which limits on such monetary exactions were ascertained in advance and enforced by the courts. Foremost among the documents establishing this system of restraints on the exercise of arbitrary power to inflict monetary punishment was Magna Carta. The amercements clauses of Magna Carta, Chapters 20-22, provided that punitive awards must be proportionate to the offense and imposed only by the early equivalent of a jury. In the tradition of Magna Carta, Article 10 of the English Declaration of Rights of 1689 and its statutory counterpart incorporated Magna Carta's principle of proportionality. The language of the Excessive Fines Clause of the Eighth Amendment was lifted virtually verbatim from Article 10.

In theory and in practice, these restraints on the exercise of power to punish persons for conduct declared to constitute civil wrongs under English common law were implemented in two stages. First, the maximum punitive award was determined according to the equivalent of a statute or by the justice of the court involved based upon the nature of the offense. Then, a group of peers of the wrong-doer determined whether the wrong-doer, based upon his financial circumstances, should pay all, part or none of that fine. What evolved over the centuries was a relatively fixed system of maximum fines which replaced the arbitrary, uncontrolled system that existed prior to Magna Carta. The punitive damage systems in place in most of the States today have reinstituted the arbitrary and capricious practices of the period before Magna Carta.

This system of restraints on arbitrary punitive awards was, as observed by this Court in 1983, not a "hollow guarantee[]." *Solem v. Helm*, 463 U.S., at 285. The English courts, in reliance on Magna Carta as reconfirmed by successor Kings, as declared to be part of English common law by the Parliament in 1297, and as enacted into statutory law on numerous occasions by later Parliaments, struck down amercements and fines as being excessive.

This same principle prohibiting excessive governmental financial penalties was brought to the Colonies in the 17th Century, where it was incorporated directly into governing documents, including those of Massachusetts, Pennsylvania and New York, in language taken directly from Magna Carta and, after 1689, in virtually all of the Colonies in language lifted directly from either Magna Carta or the English Bill of Rights of 1689.

The rest is familiar territory to the Court. When the Framers of the Bill of Rights in the First Congress considered and proposed the language that is now the Eighth Amendment, they brought to that process a tradition pursuant to which fines and financial penalties, as well as other punishments, had to be proportional. In the Eighth Amendment, they "intended to provide at least the same protection-including the right to be free from excessive punishments," *Solem v. Helm*, 463 U.S., at 286, that their English forebears had enjoyed.

## ARGUMENT

### I

#### INTRODUCTION

The Federal Constitution enshrines a "number of fundamental principles derived—immediately or ultimately—from Magna Carta . . . ."<sup>1</sup> This case presents two related questions concerning one of those principles. The first is whether the Excessive Fines Clause of the Eighth Amendment, derived from Magna Carta's restraints on excessive amercements, is to be applied to control the size of the punitive damage awards imposed by state courts in civil cases. The second question is how the principle of proportionality carried from Magna Carta into the Excessive Fines Clause is to be applied to control the size of punitive

<sup>1</sup> P. Kurland, "Magna Carta and Constitutionalism in the United States: The Noble Lie," in *The Great Charter* 57 (1965).

damages awards, such as the \$6,000,000 million award in this case, which are constitutionally "excessive." As amici will demonstrate, both of these questions may be answered by reference to the history of Magna Carta's adoption of the principle outlawing excessive amercements, the implementation of that principle in the courts and statutes of England, and ultimately the incorporation of that principle in the Excessive Fines Clause of the Eighth Amendment.

### II

#### THE EXCESSIVE FINES CLAUSE AND ITS ENGLISH ANTECEDENTS WERE INTENDED TO CONTROL THE SIZE OF MONETARY AWARDS IMPOSED FOR THE PURPOSES OF PUNISHMENT AND DETERRENCE

The governmental purposes of the punitive damage award in this case and of such awards generally is common ground: to punish the wrong-doer and to deter others who may engage in the same conduct. In the context of Vermont's tort of interference with business relations (and in the wide variety of other actions in which punitive damages are recoverable in Vermont and most other jurisdictions), the punitive damage component of the total judgment is fundamentally different from the compensatory damage component because the punitive damage component does not, in theory or actuality, compensate the plaintiff for losses suffered by reason of the conduct of the tortfeasor. Rather, a punitive damage award theoretically serves the different purpose of responding to the injury to the public which assertedly occurs in the course of the commission of an offense, in this case the offense of one business interfering in the business relations of another business.

As stated by the court below, "[p]unitive damages are designed to punish the wrongdoer and to deter similar conduct." Pet. Cert. App., 10a, 845 F.2d, at 409. Punitive



damages have been correctly characterized as "serv[ing] the same function as criminal penalties and [being] in effect private fines." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (punitive damages "are private fines levied by civil juries").

Monetary fines imposed to vindicate the public's interest in a public wrong committed by one private person against another have a long and abiding place in the English legal system, which was inherited and understood by the Framers of the Constitution and the Bill of Rights. The Framers also, as amici will demonstrate, understood the restraints which had been placed by Magna Carta and subsequent English statutes, including the English Bill of Rights of 1689, on monetary awards designed to punish and deter, and they incorporated those restraints in the Eighth Amendment.

#### A. The History of Monetary Punishments Prior to Magna Carta

Prior to the Norman Conquest in 1066, a practice existed in England under which the victim of a wrong, rather than seeking vengeance through retaliation or "blood-feud," could instead secure financial compensation from the perpetrator of the offense. Gradually, this system became mandatory, limiting the right to seek personal revenge to situations in which the injured person had sought and been refused compensation from the wrong-doer.<sup>2</sup> Such compensatory sums, known as "wers" or "bots," were imposed as compensation due to the victim. At the same time, however, a further payment, known as a "wite," would be exacted from the wrong-doer as a sum "due to

<sup>2</sup> See W. McKechnie, *Magna Carta* 284-85 (2d ed. 1958). The objective of discouraging persons from seeking revenge was reiterated seven centuries later in one of the first English cases recognizing a right of recovery of "exemplary" damages in purely private litigation. See *Grey v. Grant*, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (C.P. 1764).

the community, on the ground that every evil deed inflicts a wrong on society in general, as well as upon its victim."<sup>3</sup> This theory remains, many centuries later, as the bedrock of punitive damage theory under which the award against petitioners was imposed.

This relatively fixed and certain system of settling grievances under Anglo-Saxon law was, at some point after the Norman Conquest, succeeded "by a system, or lack of a system, by which the convicted party was 'in the King's mercy' . . . ."<sup>4</sup> Under this system, the wrong-doer's life, limbs and possessions were put at the King's mercy; the peace was thereafter restored by payment of a sum to compensate the victim for his losses—contemporary actual damages, and payment to the Crown of a sum known as an amercement<sup>5</sup>—today's punitive damages.

Because in theory a wrong-doer was "at the mercy" of the King, there was no limit on the amount he could be amerced. However, rules were formulated under which the amounts initially amerced were regulated by the gravity of the particular offense involved and were reduced based upon the ability of the wrong-doer to pay. The purpose of these rules was to prevent arbitrary and excessively large amercements, a need made urgent because "most men in England must have expected to be amerced at least once a year."<sup>6</sup>

Consistent with the theory that amercements were designed to remedy the wrong done to the public rather than

<sup>3</sup> W. McKechnie, note 2 *supra*, at 285. According to McKechnie, the size of wers and wites was often determined by various codes. *Id.*

<sup>4</sup> J. Jolliffe, *The Constitutional History of Medieval England* 225 (3d ed. 1954).

<sup>5</sup> W. McKechnie, note 2 *supra*, at 286. This payment to the Crown was based on the theory "that offenses against the established order were offenses also against the King . . . ." *Id.*, at 80.

<sup>6</sup> 2 F. Pollock & F. Maitland, *The History of English Law* 513 (2d ed. 1909).



to compensate the wrong-doer, amercements would generally be assessed in a two-stage process. In the first stage, the maximum possible amercement would be determined by the justices of the court, who had the "duty to see that the amount was proportionate to the gravity of the offense."<sup>7</sup> Indeed, the history of amercements demonstrates that the justices themselves did not establish limits on a case-by-case basis. Rather, limits were generally established by custom, local rule or the equivalent of statutes.<sup>8</sup> By the time of Henry VI, there was a recognized scale of amercements, see W. McKechnie, note 2 *supra*, at 298, and statutes also established specific limits, see F. Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300-1629*, 361 (1948). As discussed below, this engrained tradition of utilizing established limits to determine whether an amercement was proportionate to the offense involved in a particular case was reaffirmed in the English Declaration of Rights of 1689 when the proportionality principle of the amercements clauses were carried over into Article 10 of that instrument and thence into the English Bill of Rights of 1689 and the Excessive Fines Clause of the Eighth Amendment. See text accompanying note 29 *infra*.

The second-stage of the process of determining the actual amount of the amercement to be imposed in a particular case involved twelve (or fewer) neighbors who "affeered" or taxed the amercements, "reducing them in accordance with their knowledge of the wrong-doer's ability to pay."<sup>9</sup> Thus, while "[w]ealth was one of the accepted bases for fixing a fine . . .,"<sup>10</sup> it is more accurate to say that the lack of wealth functioned in this second stage of

<sup>7</sup> W. McKechnie, note 2 *supra*, at 288.

<sup>8</sup> See J. Holt, *Magna Carta* 50, 230-31 (1965).

<sup>9</sup> W. McKechnie, note 2 *supra*, at 288 (emphasis added).

<sup>10</sup> R. Stringham, *Magna Carta: Fountainhead of Freedom* 13 (1966).

the amercement process to allow for the reduction of the potential amercement which had been set based upon the gravity of the offense and *not* upon the identity, status or wealth of the person to be amerced or upon the measurement of the damages suffered by the opposing litigant.<sup>11</sup>

Although the Norman system worked reasonably well through the reign of Henry II, the reigns of his successors, Richard I and John, led, *inter alia*, to the increasingly frequent imposition of larger and larger amercements. Under King John, "[t]he whole administration of justice [was] degraded into [an] instrument[] of extortion."<sup>12</sup> This extortion was practiced at all levels of the court system, affecting freemen, barons and clergy.

## B. Magna Carta's Response to the Problem of Excessive Monetary Punishments

Although the events leading up to the drafting of Magna Carta and its presentment to King John are complex, the unbridled imposition of excessive amercements was a point of major concern to the barons who presented John with their draft of Magna Carta at Runnymede on June 15, 1215. Three chapters of Magna Carta as accepted by John

<sup>11</sup> As explained and reinforced in the 16th Century case of *Knight v. Gunter* (1534), decided in the Court of Star Chamber, "[t]he amercement was the act of the Court [and was] reduced to a certainty, by the oath of a jury . . . . [The] jurors [were] sworn to affeere, that is, tax and moderate the general amercement according to the particular circumstance of the offense and the offender." 25 Selden Society 210, 213 n.30 (1910).

<sup>12</sup> W. McKechnie, note 2 *supra*, at 22. As demonstrated by amici Alliance of American Insurers, *et al.*, in the case at bar, both this history and many other considerations preclude the adoption of wealth as an appropriate criterion for determining whether a punitive damage award violates the Excessive Fines Clause. See Br. of Alliance of American Insurers, *et al.*, at \_\_\_\_ - \_\_\_\_.

on that date were devoted to the problem of excessive amercements.<sup>13</sup> Chapter 20 provided as follows:

A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his "contenement"; and a merchant in the same way, saving his "wainage"—if they have fallen into our mercy; and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.

Chapter 21 applied these same general principles to earls and barons, while Chapter 22 applied these principles to clergy.<sup>14</sup>

As discussed above, the method by which amercements were, both before and after Magna Carta, actually imposed serves to elucidate both the procedural and substantive content of Chapter 20. The limits of exposure to amerce-

<sup>13</sup> The problem of excessive amercements had been addressed in Chapter 37 of the Articles of the Barons, a document that in many respects formed the basis for Magna Carta itself. That document, prepared earlier in 1215 by the barons, dealt expressly with excessive amercements, differing from Magna Carta's three chapters on that subject largely by its lack of adequate protection for barons and clergy. See W. McKechnie, note 2 *supra*, at 37, 490.

<sup>14</sup> At King John's entreaty, Pope Innocent issued a papal bull on August 24, 1215, which "vacated the whole charter as unjust and obtained by compulsion . . ." W. Blackstone, *The Great Charter and Charter of the Forest* xxv-xxvi (1759). However, in 1216 Henry III, upon ascending the throne at the age of nine, "renewed the great charter which was granted by his father, with such alterations and amendments as the circumstances of the times had made necessary." *Id.*, at xxvii (footnote omitted). After additional reissuances by subsequent Kings, the last occurring in 1300, Magna Carta was subsequently "confirmed, and commanded to be put in execution" by thirty-two separate acts of Parliament. *Id.*, at lxxiii-lxxiv.

ment for any specific wrong were based upon the relative severity of the offense involved, not upon the amount of compensation that might have been due to the other litigant. Threepence was a common amercement for petty offenses both before and after 1215.<sup>15</sup>

Chapter 20 provided that the size of the amercement ultimately imposed might, or perhaps should,<sup>16</sup> be *reduced* below the maximum potential amercement based upon the wrong-doer's ability or inability to pay. That determination was to be made by a body of the wrong-doer's peers based upon their investigation of the wrong-doer's financial circumstances.<sup>17</sup> Chapter 20 also provided that no amercement could be imposed if to do so would, as in the case of a merchant, result in not "saving his 'merchandise.'" This meant that, *in addition to* its other safeguards, Chapter 20 "saves to [a merchant] his means of earning a living."<sup>18</sup> A similar guarantee was extended to freemen, whose contenement—"salvo contenemento"—must be saved. And even an amercement, once settled on by these peers,

<sup>15</sup> W. McKechnie, note 2 *supra*, at 286-87 & n.3. Fitzherbert interpreted the language of Chapter 20 as limiting an amercement to the "Value of the Trespass"—no more than the single damages which were awarded to the wronged party. Fitzherbert, *Natura Brevium*, as quoted in F. Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300-1629*, 45 (1948).

<sup>16</sup> According to Fitzherbert, the amercement ultimately affeered was supposed to be less than the maximum possible amercement: "For the Nature of the Word (Mercy) is, that a Man shall not be punished so much as he hath deserved." A. Fitzherbert, *Natura Brevium* 169 (f.76) (6th ed. 1718).

<sup>17</sup> If an amercement was assessed by a judge rather than by the peers of the person amerced, it was subject to being set aside. See F. Thompson, note 15 *supra*, at 63 & n.91.

<sup>18</sup> W. McKechnie, note 2 *supra*, at 289. McKechnie observes that "merchandise" might have been understood to refer broadly to a merchant's "position as a merchant" or more narrowly to his "wares." *Id.*



could ultimately be pardoned altogether by the court based upon the "poverty" of the person to be amerced.<sup>19</sup>

### C. The Early Impact of Magna Carta on Excessive Monetary Punishments

The amercements clauses, unlike many other provisions of Magna Carta that dealt solely with the relationships between the barons and the Crown, were of universal interest and impact among the Crown's subjects. "Very likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements." F. Maitland, *Pleas of the Crown of the County of Gloucester* xxxiv (1884), as quoted in F. Thompson, note 15 *supra*, at 44. The central point of these clauses was to remove, to the maximum extent possible, the arbitrary element in the exaction of amercements: "The Crown must conform to its own customary rules."<sup>20</sup>

The history of the actual practice of the English courts under Magna Carta generally, and under the excessive amercements clauses specifically, establishes that the royal courts of England relied on the amercements clauses to invalidate excessive punishments. Magna Carta was frequently relied upon in the English courts by parties in purely private litigation,<sup>21</sup> and judgments contrary to

<sup>19</sup> *Id.*, at 288.

<sup>20</sup> *Id.*, at 287. As discussed *infra*, at 19, when the amercements clauses were carried into the English Declaration of Rights of 1689, the drafters of that instrument intended to limit fines to statutory maxima.

<sup>21</sup> See F. Thompson, note 15 *supra*, at 33. See, e.g., 55 Selden Society 2, 3 (cas. no. 2); 45 (cas. no. 34); 90 (cas. no. 65); 57 Selden Society 9, 11 (cas. no. 5); 25 (cas. no. 14); 58 (cas. no. 31); 67 (cas. no. 33); 89; 58 Selden Society 19, 20 (cas. no. 8); 21 (cas. no. 9); 69, 73 (cas. no. 42); 88, 90 (cas. no. 54); 112, 114 (cas. no. 65); 147, 148 (cas. no. 79); 211, 218 (cas. no. 106).

Magna Carta were to be held "for nought."<sup>22</sup> This reliance on Magna Carta was justified based upon the nature of the Charter itself and on enactments of Parliament which directed "that the Great Charter . . . be kept and maintained in all Points." 4 Edw. III, ch. I.

The fullest early exposition of the successful reliance by a private party on Chapter 20 of Magna Carta is to be found in the case of *Le Gras v. Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl.4 (C.P. 1316), reprinted in 52 Selden Society 3 (1934).<sup>23</sup> In that case, Richard Le Gras had previously brought an action against several private parties which was held by the court to have been improperly pleaded. As a result of this improper plea, the Baliff of the court amerced Le Gras one mark and subsequently seized two horses from Le Gras in satisfaction of the one-mark amercement.

Le Gras then brought a writ of *de moderata misericordia*, founded on the amercements clauses,<sup>24</sup> to challenge the amercement by the Baliff. Le Gras's challenge appears

<sup>22</sup> W. Dunham, "Magna Carta and British Constitutionalism," in *The Great Charter*, note 1 *supra*, at 25. As Professor Dunham observes, at least from the time (1297) that Edward I declared Magna Carta to be part of the common law, the provisions of Magna Carta were applied by the English courts as statutory law, *id.*, constituting the criteria for determining right law from wrong law and the unjust from the fair. *Id.*, at 30.

<sup>23</sup> In 1225, Magna Carta was again reaffirmed and some changes to the original version were made, including the consolidation of Chapters 20, 21 and 22 into a single chapter renumbered as Chapter 14. Because the original version of Magna Carta was lost for many centuries, see F. Thompson, note 15 *supra*, at 6-7, Chapter 14 of the 1225 version was cited by the courts and parties in cases, including *Le Gras*.

<sup>24</sup> The writ *de moderata misericordia* was recognized as having been created by Chapters 20, 21 and 22 of Magna Carta and was generally available to challenge the excessiveness of amercements due to the Crown as well as amercements due to lords. See S. Milsom, *Legal Introduction to Novae Narrationes* (E. Shanks ed.), in 80 Selden Society cci-cciii (1963).



to have been procedural—the Baliff had himself assessed the amercement rather than a group of Le Gras's peers, see note 17 *supra*, and substantive—the imposition of a one-mark amercement was alleged to be disproportionate to his offense under Chapter 20. As a result of the writ brought by Le Gras, the Baliff was directed to “take a moderate amercement proper to the magnitude and manner of that offense, according to the tenor of the Great Charter of Liberties of England . . . .” 53 Selden Society, at 5 (footnote omitted) (transl. of rec.).

Reported English cases decided subsequently to *Le Gras* amply demonstrate the point, discussed above, that “the amercement should be in proportion to the wrong done” and that “this meant the wrong done to the lord or the court, and not the other party to litigation . . . .”<sup>25</sup> Indeed, the reported cases indicate that it was common practice for a person to be found “in mercy” by a court but to have the actual amercement assessed in an essentially separate proceeding which might occur well after the judgment against him had been entered. For example, in the 13th Century, reports of numerous cases in which jurors were amerced indicate that the assessments of the amercements came at the end of the court's term and that the assessments were imposed by a single group of peers of all of those previously amerced. See 96 Selden Society xii (1981).

<sup>25</sup> See *id.*, at cci (footnote omitted) (emphasis added) (relying on Fitzherbert, *Natura Brevium* f. 75E). Fitzherbert made this point very strongly, stating that the

Amercement shall not be unto the Value of the Damages which is done unto the [wronged person], but having Regard unto the Wrong and Offense ~~done~~ unto the Lord for the Wrongs done unto his [wronged person].

A. Fitzherbert, note 15 *supra*, at 168 (f. 75).

#### D. The Role of Magna Carta in the 16th-18th Centuries

By the 16th Century, the role of Magna Carta in the English legal system was well established:

The highest and most binding laws are the statutes which are established by parliament; and by authority of that highest court it is enacted . . . that if any statute be made contrary to the great charter . . . that shall be holden for none . . . .

E. Coke, *The Second Part of the Institutes of the Laws of England*, Proeme at 7th unnumbered page (1797). By Coke's day, the distinction between amercements and fines which had existed in the 13th century had all but vanished. In the 13th Century, the word “fine” encompassed only “voluntary offerings made to the King to obtain some favor or to escape punishment.” W. McKechnie, note 2 *supra*, at 293. Indeed, even after 1215 this pre-existing practice of imposing such “fines” was a means of evading Magna Carta, because a judge could threaten a defendant with a prison sentence and then exact from that defendant an enormous fine, payment of which would allow the defendant to escape imprisonment. This exaction could occur, unlike the imposition of an amercement, without the interposition of the defendant's peers as required by the amercements clauses. *Id.* See also 2 F. Pollock & F. Maitland, note 6 *supra*, at 517-18.<sup>26</sup>

An amercement, in sharp contrast, was a sum imposed as a punishment; it had no “voluntary” element to it. Under the system of amercements—in contrast to the sy-

<sup>26</sup> “Fines” as that term was understood in the 13th Century are addressed in Chapter 55 of Magna Carta, which provides in pertinent part:

All fines made . . . unjustly and against the law of the land, and all amercements imposed unjustly and against the law of the land, shall be entirely remitted . . . .

W. McKechnie, note 2 *supra*, at 454.

tem of fines—justice could not be bought and sold. Over the intervening centuries between 1215 and the early 17th Century, this “option” of buying justice was gradually eliminated and, with that elimination, the word “fine” took on its more modern meaning and the word “amercement” was no longer generally used.<sup>27</sup>

This use of the word fine carried through into the English Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, Ch. 2 (1689), which provided that “excessive Baile ought not to be required nor excessive fines imposed nor cruel and unusual Punishments inflicted.” That document was essentially an enactment of the Declaration of Rights of 1689 (the “Declaration”), which was prepared by a parliamentary convention called to deal with the vacancy in the English throne occasioned by the Glorious Revolution of 1688-89 that had resulted in the abdication of James II. Upon accepting the Declaration, William and Mary had been permitted jointly to ascend the throne in February 1689. See L. Schworer, *The Declaration of Rights, 1689*, 259 (1981). That instrument was “in the tradition of Magna Carta.” G. Smith, *A Constitutional and Legal History of England* 367 (1955).<sup>28</sup> In that tradition, the Declaration listed the arbitrary acts of the Stuart Kings that had finally brought on the Glorious Revolution of 1688. These acts included the imposition of “unduly heavy fines.” *Id.*, at 368.

<sup>27</sup> *Id.*, at 293. The late 15th Century furnishes an example of the interchangeability of the words amercement and fine where, in an action for debt, a defendant could either be required to “make a *groat fyne*, [or] in other casys bot to be amersyed.” 1 *Borough Customs* (M. Bateson ed.), in 18 *Selden Society* 206 (1904). See *Griesy's Case*, 8 Co. Rep. 38a, 77 Eng. Rep. 530 (C.P.) 1588 (court uses words “fine” and “amercement” interchangeably and assumes applicability of Magna Carta's prohibition on excessive amercements to both).

<sup>28</sup> These documents were, as discussed below, later “to serve as the models for like provisions in the American Bill of Rights.” 1 B. Schwartz, *The Bill of Rights: A Documentary History* 41 (1971).

The principles of Chapter 20 of Magna Carta were engrafted into Article 10 of the Declaration by a committee of the parliamentary convention. The drafters “wanted to prohibit punishments that were unauthorized by statute . . . .” L. Schworer, *supra*, 93-94, a principle applicable in earlier centuries, see text accompanying note 8 *supra*. Once again, the determination of proportionality was not to be left to the speculation of juries or the subjective judgments of judges on a case-by-case basis but, rather, was to be made within the context of a range of punishment prescribed by statute to cover classes of offenses. The historical materials associated with that drafting process establish that Article 10's express prohibition on excessive fines was intended to apply to fines and amercements, whether imposed in civil or criminal proceedings. See *id.*, at 91-94.<sup>29</sup>

The juridical vitality of the amercements clauses of Magna Carta as reiterated in the English Bill of Rights of 1689 was recognized within three months of enactment of the latter in *Earl of Devon's Case*, 11 State Tr. 1354 (1689). In that case, William Earl of Devonshire had been

<sup>29</sup> As has been documented, the original version of Article 10 expressly prohibited excessive bail only in criminal case but did not so limit its prohibitions on excessive fines or cruel and unusual punishments. The limitation to criminal cases was subsequently deleted in the final version of Article 10. L. Schworer, *The Declaration of Rights, 1689*, App. 3, at 300 (1981). It is thus clear, as confirmed by this Court's application of the Excessive Bail Clause to civil cases in *Carlson v. Landon*, 342 U.S. 524 (1952), that all three clauses of Article 10 were viewed as applying to civil and criminal matters. See also Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1254-56 (1987). It is equally clear from a review of the briefs filed in this Court that this history was not brought to the attention of the Court in *Ingraham v. Wright*, 430 U.S. 651 (1977). That fact alone seriously undermines the reliance placed by various courts, including the court below, on *dictum* in *Ingraham* suggesting that the Eighth Amendment applies only to punishment imposed in criminal cases.



proceeded against before the King's Bench as a result of his striking a Colonel Culpepper within the environs of the King's Palace. For that act, the Earl was fined 30,000 pounds. *Id.*, at 1357. His case was appealed to the House of Lords on several grounds, including the "excessiveness of the fine." *Id.*

In the argument made to the House of Lords on behalf of the Earl, it was contended, *inter alia*, that the fine was disproportionate to the level of the fines normally imposed for such an offense: "whenever the law has set down a fine, either by way of punishment or caution, it seldom exceeds 2,000*l.*" *Id.*, at 1364. The privileges committee of the House of Lords reported the case to the House on April 22, 1689. The House of Lords, after deliberation, concluded, on May 6, 1689, that the fine "was excessive and exorbitant, against Magna Carta, the common right of the subject, and against the law of the land." *Id.*, at 1370. Magna Carta, of course, could have been thought applicable if, and only if, the Lords had understood that the amercements clauses reached "fines" such as the fine imposed against the Earl of Devonshire.

The unbroken continuum anchored by the amercements clauses of Magna Carta and reiterated in the prohibition on "excessive fines" in the English Bill of Rights of 1689 is confirmed by Solicitor General Blackstone in the 18th Century. In Volume 3 of his *Commentaries*, which is devoted to "Private Wrongs," Blackstone identifies six types of private civil actions in which, if the private plaintiff prevailed, the defendant was required to pay a fine to Crown. 3 W. Blackstone, *Commentaries on the Law of England* \*118-19, \*138, \*179, \*188, \*398, \*402 (1768). Such fines would have been subject to the Excessive Fines Clause of the English Bill of Rights of 1689. See, e.g., *Griesley's Case*, 8 Co. Rep. 38a, 77 Eng. Rep. 530 (C.P. 1588). Furthermore, in Volume 4 of his *Commentaries*, Blackstone stated his view that, "The reasonableness of fines in criminal cases has also been usually regulated by

the determination of Magna Carta, concerning amercements for misbehavior in matters of civil right." 4 W. Blackstone, *Commentaries on the Laws of England* \*372 (1768) (footnote omitted). From this statement, there is no doubt that Blackstone perceived Article 10 of the Declaration as regulating civil and criminal punishments.

### E. The Influence of Magna Carta in the Colonies

It was to the English Bill of Rights of 1689, "as to Magna Carta, [that] the colonists turned as the documentary evidence of the fundamental rights and liberties of all Englishmen . . ." Indeed, these "[r]ights and liberties of Englishmen embodied in Magna Carta, the Bill of Rights, and other constitutional documents became vital features of colonial constitutional law . . ." <sup>30</sup>

The Massachusetts Body of Liberties of 1641 is one of the earliest examples of the direct incorporation into colonial law of the excessive amercements principle of Magna Carta. It is a particularly important example because it establishes that the colonists believed that the excessive amercements principle was applicable to fines imposed on a private litigant where the fine was payable directly to the opposing private litigant rather than to the Crown.

In 1635, the Massachusetts General Court decided that "some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Carta, which . . . should be received for fundamental laws." 1 *Mass. Records* 147, as quoted in G. Haskins, *Law and Authority in Early Massachusetts* 36 (1960). The result of this effort was the

<sup>30</sup> H. Hazeltine, "The Influence of Magna Carta on American Constitutional Development," in *Magna Carta Commemoration Essays* 182, 183-184 (H. Malden ed. 1917). Hazeltine traces the basis for the colonists' repeated assertions of entitlement to the rights and liberties of Englishment to the early Royal Charters, such as the first Virginia Charter granted by James I, which specifically asserted that colonists in Virginia were to enjoy those rights. *Id.*, at 187.



Massachusetts Body of Liberties of 1641 ("Liberties of 1641"), section 37 of which read, in pertinent part, as follows:

In all cases where it appears to the Court that the plaintiff hath willingly and wittingly done wrong to the defendant in commencing against him, They shall have power to *impose upon him a proportionable fine to the use of the defendant.* . . .<sup>31</sup>

The liberties of 1641, however, proved unsatisfactory to a group of freemen of the colony of Massachusetts who, in 1646, petitioned the Governor and General Court for a more complete and specific set of rules. A. Howard, *The Road from Runnymede* 41 (1968). The General Court responded to this petition by issuing a document entitled the Massachusetts "Parallels" in which the General Court sought to alleviate the concerns which had been expressed by demonstrating the relationship between the provisions of the Liberties of 1641 and Magna Carta. The "Parallels" read, in pertinent part, as follows (emphasis added):

<sup>31</sup> Massachusetts Body of Liberties of 1641, § 37, as quoted in 1 B. Schwartz, note 28 *supra*, at 76 (emphasis added). Paralleling the quest for certainty and freedom from arbitrariness which characterized the evolution of the amercements clauses, the General Court had, by 1648, amended section 37 so as to provide that the erring plaintiff "shall pay treble damages to the partie grieved, and be fined forty shillings to the Common Treasure." *The Laws and Liberties of Massachusetts* 49 (T. Barnes ed. 1982).

## Magna Charta

## Fundamentalls of the Massachusetts

- |                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>7. No amerciament shall be, but for reasonable cause, and according to the quantity of the offence; saving to a freeman his freehold, and to a merchant his merchandize; and no such amerciament to be assessed but by the oaths of good and lawful men of the vicinage.</p> | <p>7. Upon unjust suites the plaintiff <i>shall be fined proportionable to his offense.</i> Liberty, 37. No mans goods shall be taken away, but by a due cause of justice. Liberty, 1. In criminal causes it shall be at the liberty of the accused partie, to be tryed by the bench or by a jury. Liberty, 23.</p> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

We to not fine or sentence any man, but upon sufficient testimonie upon oath, or confession. Custome.

A. Howard, *supra*, at 404. The Fundamentalls establish that the members of the General Court regarded the amercements clauses of Magna Carta as applicable to fines imposed in civil cases even though the fine was paid to the defendant.

The Pennsylvania Frame of Government of 1682 was equally, if not more, specific as regards the incorporation of the amercements clauses into the fundamental law of Pennsylvania. That document is of particular importance, being regarded as "[i]n many ways, the most influential of the Colonial documents protecting individual rights . . . ." 1 B. Schwartz, note 28 *supra*, at 130. William Penn, who in 1687 was responsible for the first publication of Magna Carta in America, A. Howard, *supra*, at 89, drafted the Frame of Government and brought it with him from

England in 1682. *Id.*, at 88. The "most important guarantees of the Penn document (at least in their influence on later Bills of Rights) [had] to do with judicial procedure," 1 B. Schwartz, note 28 *supra*, at 131. Section XVIII specifically provided that "all fines shall be moderate, and saving men's contentments, merchandize, or wainage." *Id.*, at 141. Once again, it is clear from the unqualified language chosen that Penn, as did the General Court of Massachusetts, understood Chapter 20 of Magna Carta to be applicable to fines, whether rendered in civil or criminal cases.

In 1683, the New York General Assembly enacted the New York Charter of Libertyes and Privileges of 1683, which provided in pertinent part:

That A freeman Shall not be amerced for a small fault, but after the manner of his fault and for a great fault after the Greatnesse thereof Saving to him his freehold, And a husbandman saving to him his Wainage and a merchant likewise saving to him his merchandize And none of the said Amerciaments shall be assessed but by the oath of twelve honest and Lawfull men of the Vicinage provided the faults and misdemeanors be not in Contempt of Courts of Judicature.

1 B. Schwartz, note 28 *supra*, at 165.<sup>32</sup>

In 1712, the colonial legislature of South Carolina enacted Magna Carta into law in that colony, while the North Carolina legislature followed suit in 1715. See H. Hazeltine, note 30 *supra*, at 196. These actions demonstrate that the colonists were both familiar with the protections

<sup>32</sup> As in the Pennsylvania Frame of Government of 1682, see 1 B. Schwartz, note 28 *supra*, at 141, the New York Charter of Libertyes provided for bail in a provision separate from the provision dealing with excessive fines. *Id.*, at 166.

provided by Magna Carta and that they desired to implement those protections in the colonies while adapting them to the special circumstances which existed in the colonies.<sup>33</sup>

#### F. The Treatment of Excessive Monetary Punishments in Revolutionary Declarations and Constitutions

At the time of the Declaration of Independence, the English Bill of Rights of 1689 had joined Magna Carta as the second major documentary expression of the rights of Englishmen. Thus, its language respecting excessive fines was incorporated in a number of revolutionary declarations which were issued. For example, the Virginia Declaration of Rights of 1776, authored by George Mason, "repeated from prior documents the right against excessive bail and fines . . . (this time using the very language of the English Bill of Rights that was to become the Eighth Amendment) . . ." 1 B. Schwartz, note 28 *supra*, at 233. The same basic language from the English Bill of Rights of 1689 was also adopted in other colonies. See *id.*, at 278 (Delaware Declaration of Rights of 1776, § 16); 282 (Maryland Declaration of Rights of 1776, § XXII); 287 (North Carolina Declaration of Rights of 1776, § X).

The colonists, however, clearly assumed the interchangeability of language in Magna Carta and the English Bill of Rights of 1689 where each document addressed the same subject. In Pennsylvania, language more closely associated with Chapter 20 of Magna Carta was utilized to address the problem of excessive fines. Thus, the language of Section XVIII of the Pennsylvania Frame of Government of 1682, based squarely on Chapter 20 as discussed above, was merely shortened to read, in section 29 of the

<sup>33</sup> The adoption and adaptation of Magna Carta's amercements clauses by the colonists paralleled the somewhat better known adoption and adaptation of Chapter 39 of Magna Carta into what ultimately became the Due Process Clause of the Fifth Amendment. See A. Howard, *The Road from Runnymede* 37-38 (1968); H. Hazeltine, note 30 *supra*, at 218-19.

Pennsylvania Declaration of Rights of 1776, "all fines shall be moderate." 1 B. Schwartz, note 28 *supra*, at 272. As observed by Professor Howard, *see* A. Howard, *supra*, at 213, the concept of proportionality in the Excessive Fines Clause of the Eighth Amendment arises directly out of Chapter 20 Magna Carta, and only secondarily out of the language of the English Bill of Rights dealing with cruel and unusual punishments. This observation is confirmed by this Court's decision in *Solem v. Helm*, 463 U.S., at 285, in which it is stated that the principle of proportionality in Magna Carta's amercements clauses was "repeated" in the English Bill of Rights of 1689.<sup>34</sup>

#### G. George Mason's Objections to the Federal Constitution

George Mason, the author of Virginia's Declaration of Rights of 1776, left no doubt about the origins of the Excessive Fines Clause and other provisions of that instrument. These rights had been "received from our Ancestors, and, with God's leave, we will transmit them, unimpaired to our Posterity." 1 *The Papers of George Mason* 71 (R. Rutland ed. 1970). Mason objected to the proposed Federal Constitution in part because there was not, as Mason observed, a "declaration of rights . . . ." 1 B. Schwartz, note 28 *supra*, at 444. Mason went on to argue that in the absence of a federal declaration of rights, "the people [are not] secured even in the enjoyment of the benefit of the common law . . . ." *Id.*, at 444-45. (Magna

<sup>34</sup> The dissent in *Solem v. Helm* took the view that the Cruel and Unusual Punishments Clause of the Eighth Amendment did not incorporate Magna Carta's principle of proportionality but, rather, was directed only to eliminating the various kinds of torture imposed in the reign of the Stuart Kings. 463 U.S., at 312 (Burger, C.J. dissenting). Even if that view had prevailed in *Solem*, the concept of proportionality is necessarily inherent in the notion of an "excessive fine," leaving no doubt that at the very least Magna Carta's principle of proportionality was incorporated into that part of Article 10 of the English Declaration of Rights which addresses excessive fines.

Carta had been declared to be part of England's common law in 1297 by statute, 25 Edw. I, ch. I, 1 Stat. at Large 131-32.) The proponents of the proposed constitution responded:

The principles of the common law, as they now apply, must surely always hereafter apply, except in those particulars in which express authority is given by this constitution . . . .

*Id.*, at 450. Mason was not persuaded and thereafter he

led the attack on the [proposed] Constitution, drawing on the historical example of the English documents, such as Magna Carta and the Bill of Rights, which served to secure the liberties of Englishmen.

A. Howard, *supra*, at 222-23.<sup>35</sup> In the state ratifying conventions, however, the proponents of the Constitution sans Bill of Rights initially prevailed, largely on the argument that because the proposed Constitution, unlike any comparable English document, was designed as a limit on governmental power, individual rights were not to be assumed to have been relinquished. *See id.*, at 230-31.

Mason's views, shared by many others, ultimately prevailed when the Bill of Rights became, only four years later, "the bridge between Magna Carta in England and the Charter's legacy in America. *Id.*, at 239-40. The Excessive Fines Clause of Eighth Amendment, lifted verbatim from the Virginia Declaration of Rights of 1776 and the English Bill of Rights of 1689, brought with it centuries of history that convincingly demonstrates its appl-

<sup>35</sup> As Professor Howard observes, Magna Carta was largely irrelevant to the unamended Constitution because Magna Carta was not "in the main concerned with the distribution of governmental powers . . . ." A. Howard, note 33 *supra*, at 220.



icability to monetary fines imposed for the proposes of punishment and deterrence.

### CONCLUSION

The *ad hoc* system under which Vermont (and many other States) metes out punishment in the form of punitive fines imposed by civil juries pursues the same governmental objectives as the system under which wites, amercements and fines have been imposed in England for a millennium. However, the courts of this country have failed to recognize that the common law rules under which this system developed placed tight restrictions on the amount of punishment that might be imposed, restrictions written into the various documents comprising the English Constitution. In the case at bar, it falls to this Court to declare once again that the Eighth Amendment *at the very least* incorporated the controls over punishments established by Magna Carta and incorporated in the English Bill of Rights and that the Excessive Fines Clause should therefore be applied to monetary punishments imposed in civil and criminal cases alike.

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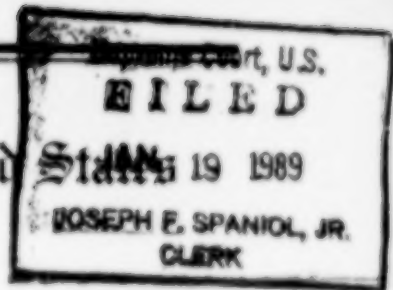
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**AMICUS CURIAE**

**BRIEF**

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988



BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. and  
BROWNING-FERRIS INDUSTRIES, INC.,  
v. *Petitioners,*

KELCO DISPOSAL, INC. and JOSEPH KELLEY,  
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

BRIEF OF AMICI CURIAE JOHNSON & HIGGINS  
AND THE DEFENSE RESEARCH INSTITUTE  
IN SUPPORT OF PETITIONERS

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

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No. 88-556

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BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. and  
BROWNING-FERRIS INDUSTRIES, INC.,  
*Petitioners,*

v.

KELCO DISPOSAL, INC. and JOSEPH KELLEY,  
*Respondents.*

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On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

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BRIEF OF AMICI CURIAE JOHNSON & HIGGINS  
AND THE DEFENSE RESEARCH INSTITUTE  
IN SUPPORT OF PETITIONERS

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**INTEREST OF THE AMICI CURIAE**

Johnson & Higgins is one of the largest insurance brokers in the United States.<sup>1</sup> Its clients are businesses, associations and government entities that are insured or self-insured against property and casualty claims. Both Johnson & Higgins and its clients have a vital interest

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<sup>1</sup> The consents of Petitioners and Respondents for the filing of this brief are on file with the Clerk of the Court.



in the maintenance of a healthy insurance and risk financing system and a viable on-going industrial base in this country.

The Defense Research Institute (DRI or the Institute) is the largest national organization of lawyers specializing in the defense of civil litigation. The Institute has nearly 14,000 members. They practice in every state. DRI's total constituency consists of some 25,000 defense trial lawyers through affiliation with the International Association of Defense Counsel, the Federation of Insurance and Corporate Counsel, the Association of Defense Trial Attorneys, and some sixty state and local defense attorney organizations. DRI members defend clients in civil litigation in countless cases on a day-to-day basis in courtrooms across the nation. The Institute, by its research, publications and public speech, has actively sought to limit the recovery of punitive damages and to establish that constitutional standards exist governing the award of such damages, beginning at least as early as 1969.<sup>2</sup> The Institute and its members share a common interest in insuring that awards of punitive damages are fair and just.

Predictability and fairness are essential to the future investments in new productive capacity needed to sustain this nation's continuing economic prosperity. They are also the keys to having adequate insurance available to the American public at affordable, reasonable costs. Predictability as to economic consequences, in turn, is dependent upon a stable legal system where those who decide on whether to act or how to act, and those who decide whether to insure and, if so, at what price, can do so with fairly accurate knowledge of the likely legal consequences. This foreseeability of legal consequences is one of the most important elements in business planning.

<sup>2</sup> DRI Monograph, *The Case Against Punitive Damages* (1969); J. Ghiardi and J. Kircher, *Punitive Damages*, § 21.001 (1984).

Potential investors', insurers' and self-insurers' decisions are based on estimates as to the probabilities of loss occurring and the potential range of such losses.

While the judge-made common law has always been in an evolutionary process of change, this change traditionally occurred only in small increments. Thus it was possible for investors and insurers to bracket the range in which changes might occur, and thus still assess overall risk with some degree of accuracy.

This country has experienced what the Government has characterized as the "Insurance Availability/Affordability Crisis."<sup>3</sup> One of the causes of the current crisis is the growth in both the number and size of punitive damage awards. While most insurance policies do not insure against such awards, the growing threat of such awards has now become a major source of uncertainty in litigation involving claims that are within the scope of existing policies. Not only does the presence of punitive claims increase the costs of defense under such policies, but they also make settlements more difficult or impossible.

A principal obstacle to fair settlements is that in many jurisdictions, there is no effective constraint on the size of such awards. There the only standard for settlement is sheer speculation as to what a jury may or may not award. Thus, punitive damages exert a "shadow effect" on awards and settlements which permeates the civil

<sup>3</sup> *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability*, February 1986. This interagency working group consisted of representatives of ten federal agencies and the White House. The primary contributing agencies included the Department of Justice, the Department of Commerce, and the Small Business Administration. The Report was supplemented by *An Update on the Liability Crisis*, dated March 1987.

justice system.<sup>4</sup> Defense trial lawyers daily see this effect in action, for example, even in simple automobile cases, insurance coverage disputes, professional malpractice cases, as well as in business, commercial and product liability litigation. The ISO Data, Inc. studies confirm that even routinely pleading punitive damages has the effect of racheting upward claim costs.<sup>5</sup> Thus, the incidence of escalating unlimited punitive damages awards falls not only haphazardly upon unpopular defendants but on the public generally through the indirect effects of increased litigation costs, distortion of damage awards and adverse effects on the settlement process.

The arguments in this brief demonstrate why judges have an obligation under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to limit such awards that are so disproportionate that they constitute excessive punishment. Articulation of that principle in this case will go far to restore both fairness and predictability to our legal system.

#### SUMMARY OF ARGUMENT

We make three points. First, given recent research there can no longer be serious doubt that there is a constitutional objection to disproportionately large awards of punitive damages. Second, the problem of disproportionality is related to unconstrained jury discretion in assessing punitive damages. Third, a disproportionately large punitive award cannot be justified by reference to the defendant's wealth. Vermont law notwithstanding, the defendant's wealth is irrelevant to the determination of an appropriate punitive award and cannot be used to sustain the constitutionality of a judgment that would otherwise be deemed excessive by other objective criteria.

<sup>4</sup> ISO Data, Inc., *Claim File Data Analysis: Overview* (1988), and *Claim File Data Analysis: Technical Analysis of Study Results* (1988).

<sup>5</sup> *Id.*, at p. 11 and p. 76.

#### ARGUMENT

##### I. GROSSLY DISPROPORTIONATE AWARDS OF PUNITIVE DAMAGES ARE UNCONSTITUTIONAL

Punitive damages are punishment. They are not compensatory and cannot be justified on that ground. Rather, punitive damages are awarded for reasons of retribution and deterrence—rationales identified by this Court as legitimate *only* for purposes of punishment.<sup>6</sup> Thus, punitive damages are a form of punishment and can be justified only on that ground.

This would be too obvious for mention were it not for the persistent misapprehension that *civil* sanctions somehow cannot count as punishment. A moment's reflection discredits that view. Punishment does not necessarily become less harmful or less coercive simply because it is labeled "civil." The distinction between civil and criminal punishments is often a matter of form. Especially is this so where the defendant is a business entity and thus beyond the reach of the distinctively penal sanction of incarceration.

The important distinction is not between civil and criminal punishment, but between punishment (whether civil or criminal) and compensation. Compensation involves the allocation of existing loss. Once injury has occurred, the only question is who should bear the loss. Punishment by contrast, is the *creation* of loss. Punishment is an intentional infliction of harm by the state. No society founded on the principle of limiting state power can tolerate unconstrained punishment. And that is true whether the punishment is denominated "civil" or "criminal." This conclusion does not depend on the assertion that punitive damages "are" criminal sanctions or that law must treat them the same. A strong argument to that effect could be made from *Kennedy v.*

<sup>6</sup> *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) ("Retribution and deterrence are not legitimate nonpunitive governmental objectives.").



*Mendoza-Martinez*, 372 U.S. 144 (1963), which lists seven criteria for determining whether a statutory sanction should be characterized as civil or criminal, but that argument is unnecessary. The essential premise of this analysis is not that punitive damages are criminal, but only that punitive damages are punishment.

A fundamental constitutional principle constraining the imposition of punishment is that it not be excessive—that is, that it not be grossly disproportionate to the actor's misconduct. This principle is accepted in the criminal law,<sup>7</sup> but there has been resistance to its application beyond that context.<sup>8</sup> Notwithstanding this resistance, it is now plain that the constitutional protection against excessive punishment is not concerned solely with the criminal laws. Such a limitation would be unsupported by the text of the relevant constitutional provisions, inconsistent with the history underlying those provisions, and contrary to the fundamental constitutional purpose to protect life, liberty, and property from arbitrary deprivation.

The relevant constitutional texts are the Due Process Clause of the Fourteenth Amendment and the Excessive

<sup>7</sup> See *Solem v. Helm*, 463 U.S. 277 (1983).

<sup>8</sup> The court below and other lower courts have cited *Ingraham v. Wright*, 430 U.S. 651, 664-68 (1977), as support for the proposition that the Eighth Amendment does not apply to punitive damages because they are awarded in civil rather than criminal proceedings. But that reliance is misplaced. While the Court in *Ingraham* adhered to the traditional criminal focus of cases under the cruel and unusual punishment clause, it was careful not to state categorically that other provisions of the Eighth Amendment could have no application outside the criminal context. Moreover the Court expressly contemplated that some punishments might be treated as criminal even though not so labeled. *Id.*, at 669 n.37. Thus, *Ingraham* does not preclude the application of Eighth Amendment principles outside the criminal context. See Freeman, *Justice Powell's Constitutional Opinions*, 45 Wash. & Lee L. Rev. 411, 444 n.189 (1988) (reconciling *Ingraham*, *Solem*, and *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

Fines Clause of the Eighth Amendment. Neither is limited to the law of crimes. The Due Process Clause states broadly: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." It contains no hint of limitation to the criminal law and has never been so construed.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Of these three provisions, the Excessive Fines Clause speaks most directly to the problem of excessive punitive awards. Note that while the reference to "bail" evokes the criminal law, neither "fines" nor "punishments" are necessarily criminal. Moreover, the absence of expressly limiting language in the Excessive Fines Clause stands in telling contrast to other Bill of Rights provisions, many of which are phrased explicitly to reach only criminal prosecutions.<sup>9</sup> The excessive fines clause, by contrast, speaks to the severity of punishment, not to its characterization as civil or criminal. There is thus no texture warrant for limiting this guarantee to the criminal law.

Neither is there any historical basis for such a limitation. The pre-constitutional history of the protection against disproportionate punishment was summarized by this Court in *Solem v. Helm*<sup>10</sup> and has been elaborated elsewhere.<sup>11</sup> In brief, it is the history of amerce-

<sup>9</sup> The Fifth Amendment states that "No person shall be held to answer for a capital, or otherwise infamous crime" without indictment by grand jury, and that no person shall "for the same offence . . . be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . . ." (Emphasis added). The Sixth Amendment similarly specifies rights applicable to "all criminal prosecutions." (Emphasis added). When the Framers wanted to provide guarantees applicable only to criminal prosecutions, they knew the words to accomplish that end.

<sup>10</sup> 463 U.S. 277, 284-86 (1983).

<sup>11</sup> See Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147-58 (1986) (recounting the his-



ments—fines paid to the king to restore wrongdoers to the protection of the law. In Norman England, amercement was the usual penalty for a very broad range of delicts and offenses. These fines were assessed ad hoc and in potentially unlimited amounts. The resulting abuses led to inclusion in Magna Carta of three chapters devoted to the limitation of amercements. Chapter 20 provides in part: “A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense . . . .”<sup>12</sup> Here is an early and plain statement of the principle that financial punishment must not be disproportionately severe. Moreover, that principle was developed to limit excessive fines that were *not* distinctively criminal in nature.<sup>13</sup>

tory of both the Due Process Clause and the Eighth Amendment and finding historical warrant for applying both to limit the magnitude of awards of punitive damages); Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233 (1987) (confirming that conclusion with respect to the Excessive Fines Clause on the basis of a far more elaborate investigation of its history). See also, *The Constitutionality of Punitive Damages under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699 (1987).

<sup>12</sup> W. McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* at 285 (2d rev. ed. 1914). The remainder of chapter 20 extends the same protection to merchants and villeins. Nobles and clergy are covered by chapters 21 and 22, respectively. Thus, Magna Carta’s protection against excessive amercements extended to all segments of society.

<sup>13</sup> Pollock and Maitland make clear that it was the taking of property, and not the label the king or the lord applied to the taking, that was the essence of an amercement and Magna Carta’s limitations applied notwithstanding the label. Thus, “[i]n Glanvill’s day . . . men are always falling into the king’s mercy in the course of civil actions.” 2 F. Pollock and F. Maitland, *The History of English Law*, 515 n.4 (2d ed. 1898).

The link between these provisions of Magna Carta and our Bill of Rights is direct and clear. The protection against excessive amercements was carried forward in the First Statute of Westminster<sup>14</sup> and in the “excessive fines” language of the English Bill of Rights.<sup>15</sup> The language of the latter was used by George Mason in article I, section 9 of the Virginia Declaration of Rights, which formed the basis for the Eighth Amendment to the United States Constitution. Moreover, and independently of the Eighth Amendment, the Due Process Clause of the Fifth Amendment has long been held to incorporate the fundamental liberties and protections secured by Magna Carta.<sup>16</sup> Among those guarantees was the protection against excessive punishments, whether civil or criminal.

Finally, there is nothing in logic or policy to suggest that the constitutional protections against disproportionate punishment should not apply to punitive damages. There can be no doubt that punitive damages are functionally civil fines.<sup>17</sup> Like other fines, punitive awards impose monetary penalties on particularized assessments of fault. The excessiveness of punishment inflicted by a fine is obviously a function of amount, not characterization as civil or criminal. A civil fine can be every bit as “excessive” as a criminal fine, and should be equally objectionable. That the penalties are paid to private plaintiffs rather than to the state itself does not matter, for the due process and excessive fines provisions were

<sup>14</sup> 3 Edw. 1, ch. 6 (1275).

<sup>15</sup> 1 Wm. & Mary sess. 2, ch. 2 (1689).

<sup>16</sup> See, e.g., *Murray’s Lessee v. Hoboken Land & Improv. Co.*, 59 U.S. (18 How.) 272, 276 (1855); *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

<sup>17</sup> See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 260 (1984) (Blackmun, J., dissenting) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

intended to forbid excessive punishment, not government self-enrichment.

Thus, text, history, and policy make plain that the constitutional protections against excessive punishment are fully applicable to awards of punitive damages. There can be no objection in principle to constitutional scrutiny of the judgment below.

## II. THE PROBLEM OF DISPROPORTIONALITY IS EXACERBATED BY UNCONSTRAINED JURY DISCRETION IN ASSESSING PUNITIVE DAMAGES

It is commonplace to observe that juries are very largely unconstrained in assessing punitive damages. Vermont law is typical in investing juries with "enormous discretion" over punitive awards. Jurors are given no guidance in determining amounts. Neither do they have any opportunity to consult experience. They are simply left to select whatever sum intuition or clever advocacy may suggest.

The lack of meaningful standards for calculating punitive awards implicates constitutional concerns. As Justice O'Connor has noted, the jury's "wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1656 (1988) (O'Connor, J., with whom Scalia, J., joined, concurring). In this comment, Justice O'Connor had reference to the vagueness doctrine, which, under the decisions of this Court, applies to civil penalties, albeit less strictly than to criminal laws.<sup>19</sup> Vagueness review of punitive damages law is entirely appropriate. As this Court has rec-

<sup>19</sup> For cases in which non-criminal statutes were subjected to careful review under the vagueness doctrine, see *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) (municipal licensing ordinance), and *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982) (same).

ognized,<sup>19</sup> the heart of the vagueness doctrine is concern for the rule of law—that is, for evenhandedness and regularity in the administration of justice. The risk is that punishment will be imposed for insubstantial, unauthorized, even illegitimate reasons, as a particular jury sees fit. The evils to be retarded are caprice and whim, the misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria for determining the severity of punishment. All of these concerns are implicated by the jury's standardless discretion over awards of punitive damages, and they justify searching vagueness review.

In this case, however, an independent claim of unconstitutional vagueness arguably is not presented for review. At issue here is the disproportionality or excessiveness of the punitive award. But it is important to recognize that the two problems are closely related.<sup>20</sup> As explained below, in the context of punitive damages, vagueness and disproportionality are merely different windows on the same problem.

Disproportionality in punishment is exacerbated by, indeed is largely a function of, a lack of meaningful

<sup>19</sup> At one time, the rule-of-law rationale for vagueness review might well have been thought secondary to a concern for fair warning of prohibited conduct. Recently, however, this Court has stated, and reaffirmed, that the need to inhibit arbitrary and capricious law enforcement is in fact the "more important" goal. See *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Smith v. Goguen*, 415 U.S. 566, 574 (1974). For academic commentary supporting this view, see Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 212-19 (1985).

<sup>20</sup> See Freeman, *Justice Powell's Constitutional Opinions*, 45 Wash. & Lee L. Rev. 411, 443-45 (1988) (comparing the Due Process approach to punitive damages suggested by Justices O'Connor and Scalia with Justice Powell's earlier opinions for the Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974), and reconciling that approach with the proportionality concept vindicated in *Solem*).



standards for determining severity. Disproportionality refers to punishment that is grossly excessive in relation to the actor's misconduct. Excessiveness, however, may be revealed either directly or indirectly. Excessiveness is addressed directly by comparing the penalty to the wrong. In the context of punitive damages for economic injuries, that comparison is relatively straightforward. The measure of the wrong is the compensatory award for the economic injury inflicted. A sensible and familiar guideline, departure from which should require special justification, would be the multiple of three. The fact that legislatures, when faced with the analogous question of fixing appropriate penalties, so often choose the multiple of three suggests that figure as a sensible norm.<sup>21</sup> Moreover, using treble damages as an outer bounds for punitive damages is consistent with the origins of punitive damages under English law. Pollock and Maitland tell us that actions for damages<sup>22</sup> were a relatively late development under English common law.<sup>23</sup> Actions for punitive damages did not evolve out of these judge-made causes of action for damages, but were instead an earlier legislatively-created means to supplement the cumbersome scheme of presentments for punishing persons for wrongful conduct. These statutes did not provide for unlimited liability at the discretion of the tribunal. Instead Parliament, implementing the concept of proportionality contained in Magna Carta and subsequent charters protecting English liberties, limited punitive damages to multiples of actual damages, usually

<sup>21</sup> See, e.g., 15 U.S.C. § 15(a) (antitrust); 18 U.S.C. § 1964(c) (RICO). In these contexts, the plaintiff obtains a single sum equal to three times actual damages.

<sup>22</sup> They define damages as "not a fixed but appointed by law, but a sum of money which the tribunal, having regard to the facts of the particular case, will assess as a proper compensation for the wrong that [the plaintiff] has suffered." 2 F. Pollock and F. Maitland, *The History of English Law*, 523 (2d ed. 1898).

<sup>23</sup> *Id.* at 522.

double or treble damages.<sup>24</sup> From this perspective, it is unarguably clear that punishment more than 100 times as severe as the wrong is grossly disproportionate and excessive.

Excessiveness may also be assessed indirectly by comparing one penalty to another. Whatever the absolute level of punishment, gross departures from the norm are excessive. Especially is that so where such departures are wholly unexplained and are not justified by any rational analysis. Obviously, the lack of meaningful standards for determining the severity of sanctions invites this kind of excess. The excess is hard to quantify because it is hidden in the jury's "enormous discretion" over the size of punitive awards. Indeed, the jury's unaided intuition, or whim, is so erratic that no norm of punishment can develop. Again, the solution is to constrain the jury's discretion by a clear standard, departures from which can be strictly screened. The absence of standards invites excessive punishment.

To put the point slightly differently, one might ask whether any penalty specified for across-the-board application would ever be judged unconstitutionally disproportionate. The probable answer is "no." The generality and impersonality of framing an across-the-board standard would likely preclude gross excess. The evil of excessive punishment is far more likely to arise where the penalty is assessed *ad hoc*. The lack of meaningful standards permitting disciplined comparison with other cases invites inconsistency and arbitrariness.<sup>25</sup> Perhaps more important, the fact-specific context in which the penalty is assessed increases the risk that reason will be

<sup>24</sup> *Id.*

<sup>25</sup> This is the clear teaching of the current controlling death penalty opinions. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *McCleskey v. Kemp*, 481 U.S. 279 (1987).



inflamed by prejudice or derailed by caprice. This destructive synergy between arbitrariness and excess was the problem with amercements, as it is with punitive damages. In both contexts, the prospect of excessive punishment is exacerbated by the lack of meaningful standards for determining the range of reasonable punishment.

### III. THE PUNITIVE AWARD CANNOT BE JUSTIFIED BY REFERENCE TO THE DEFENDANT'S WEALTH

The arguments made above were not refuted by the court below. Indeed, they were barely addressed. Rather, the Court of Appeals thought the punitive award justified, almost exclusively because of its relation to the defendant's wealth. The court emphasized that the punitive award amounted to "less than .5% of BFI's revenues, approximately .6% of its net worth, and less than 5% of its net income, for fiscal 1986." The court then pronounced this judgment "not inconsistent" with various other cases, each of which is identified by comparison of the punitive award to the defendant's wealth or income. No other criterion was discussed. Thus, it is clear that the Court of Appeals thought the defendant's wealth not merely relevant, but decisive, in determining excessiveness. In substance, that court held that a punishment obviously disproportionate to the specific wrong proved is nevertheless not excessive if it is a sufficiently small fraction of the defendant's wealth or income.

Under this reasoning, the excessiveness of a punitive award is determined by a factor unrelated to the nature of the proved misconduct, unrelated to the actual injury caused by that misconduct, and unrelated to any societal interest in imposing such punishment. And the results of this analysis are wildly inconsistent. Given the view of the court below, the award of \$6 million was acceptable because (to choose one measure) it amounted to

less than one percent of the defendant's net worth. Presumably, the same penalty for the same misconduct under exactly the same circumstances would have been deemed unconstitutionally excessive had the defendant been a small local company with no affiliation to a national corporation. And, given the Court of Appeals' calculation, the same misconduct under exactly the same circumstances would have warranted a penalty of \$282 million—or over 5,000 times the actual injury—had it been done by the nation's largest company.<sup>26</sup> There can be no sense in such disparities.

Some have suggested that a larger penalty for a wealthy defendant is necessary for effective deterrence. That is not true. In fact, the defendant's wealth is utterly irrelevant in the calculus of deterrence. Deterrence theory is based on the plausible assumption that actors weigh the expected costs and benefits of their future actions. Specifically, a potentially liable defendant will weigh the benefits he will derive from an action that risks punitive liability against the discounted present expected value of the risk of such liability. Whether a defendant is wealthy or poor, this cost-benefit calculation is the same. If, as is virtually always true, a wealthy defendant derives no greater benefit from a given action than a poor defendant, then both will be equally deterred (or equally undeterred) by the prospect of punitive damages. A defendant's existing assets do not increase the expected value of a given future action. Therefore they do not require any adjustment in the level of sanction needed to offset that expected value. The defendant's wealth or lack of it is simply irrelevant to the deterrence of socially undesirable conduct.

<sup>26</sup> This figure derives from comparison of the Standard & Poor's calculation of total assets less debt for IBM and Browning-Ferris Industries for the year 1986. As a percentage of net worth, \$6 million is to Browning-Ferris as \$282 million is to IBM.

Neither is the defendant's wealth a permissible factor in determining retribution. Ordinarily, retribution is geared to the nature of the wrongful act and/or to the harmful consequences that flow from it.<sup>27</sup> Punishment based on the characteristics of the actor—as opposed to the characteristics of the act—must always be viewed with suspicion. The reasons are obvious. Punishment based on the characteristics of the actor invites judgment based on prejudice, on caprice, on unaccountable *ad hoc* reactions. The worst case is back-door reliance on illicit motivation—racial bias, religious prejudice, political opinion, or class animus. Even where no such motive exists, punishment based on the characteristics of the actor invites arbitrary and erratic vindication of concerns that have nothing to do with specific misconduct.

These concerns lie just below the surface in punitive damages litigation. Defendants are subjected to punishment over and above any compensatory obligation. This punishment is inflicted without the protections that attend criminal prosecution. In most states, juries are told that they can punish the defendant where it is merely more likely than not that the defendant deserves punishment.<sup>28</sup> Moreover, as noted earlier, the substantive criteria for imposing punitive liability are notoriously vague.<sup>29</sup> And juries are allowed to hear evidence on puni-

<sup>27</sup> The potential divergence between these two criteria is usually unimportant. Ordinarily, the consequences that flow from a wrongful act are closely related to, and not substantially divergent from, the nature of the risk that made the act wrongful. In such circumstances, there is only a theoretical interest in distinguishing the magnitude of the wrong from the magnitude of the resulting harm.

<sup>28</sup> See J. Ghiardi and J. Kircher, *Punitive Damages* § 9.12 (Supp. 1988).

<sup>29</sup> Courts use a variety of vague terms to describe the quality of behavior required to support awards of punitive damages. As one treatise summarized, "[t]here must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil

tive damages before determining compensatory liability. The possibility of prejudice under such a regime is obvious.

Then into this loose and flabby proceeding comes evidence of the defendant's wealth. Such evidence threatens to bring the politics of economic envy and resentment into the courtroom. Particularly where a large corporation is involved, juries are tempted to engage in *ad hoc* redistribution of wealth. Of course, some such instinct might arise in any case, but admitting evidence of the defendant's wealth encourages and legitimates the Robin Hood reaction. It validates an extra-legal approach to civil punishment and in doing so offends the values of fairness and regularity associated with the rules of law.

Of course, it is true that there are graver violations of the rule of law than focusing on the defendant's wealth to determine punitive damages. Everyone would agree that it is worse to punish an individual for race or religion than to punish a corporation for wealth. But such comparisons are not to the point. The crucial point is that all status-based punishment is objectionable and should be discouraged. In the instant case, the court below not only did not preclude punishment based on status; it affirmatively justified on that ground an otherwise indefensible sanction. The reliance on an illegitimate concern to justify an otherwise indefensible verdict is worse than inadequate; it is perverse.

At the very least, therefore, this Court should remand for reconsideration of an appropriate punitive award with explicit directions that the constitutionally mandated inquiry into disproportionality cannot be evaded by reference to the defendant's wealth. That small step

motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton." W. Prosser and P. Keeton, *Torts* 9-10 (1984).

would make a great beginning in implementing the constitutional guarantee against excessive punishment.

# CONCLUSION

For the reasons stated above, the judgment of the court of appeals below should be reversed.

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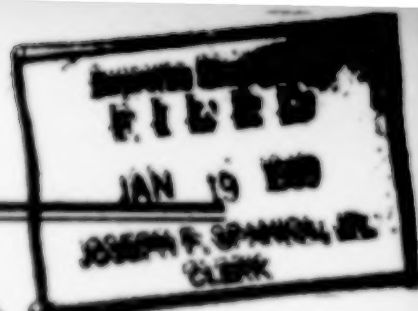
January 19, 1989

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**AMICUS CURIAE**

**BRIEF**



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., AND  
BROWNING-FERRIS INDUSTRIES, INC.,  
v. *Petitioners,*  
KELCO DISPOSAL, INC., AND JOSEPH KELLEY,  
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

BRIEF OF MERRILL LYNCH, PIERCE,  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

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No. 88-556

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BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., AND  
BROWNING-FERRIS INDUSTRIES, INC.,  
v. *Petitioners,*

KELCO DISPOSAL, INC., AND JOSEPH KELLEY,  
*Respondents.*

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On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

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BRIEF OF MERRILL LYNCH, PIERCE,  
FENNER & SMITH INCORPORATED,  
PRUDENTIAL-BACHE SECURITIES INC.,  
AND SHEARSON LEHMAN HUTTON INC.,  
AS AMICI CURIAE IN SUPPORT OF PETITIONERS

---

**INTEREST OF THE AMICI CURIAE <sup>1</sup>**

The amici are major American securities firms that do business in all fifty states. They are regulated under the federal securities laws, state securities laws, and the rules and regulations of the securities exchanges and other self-regulatory organizations. They are also subject to liability for conduct deemed to be tortious under state law.

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<sup>1</sup> Written consent to the filing of this brief amicus curiae has been obtained from the parties to this case. Copies of the consent letters accompany this brief.

Section 28(a) of the Securities Exchange Act of 1934 provides that no person may recover damages under that statute "in excess of his actual damages on account of the act complained of."<sup>2</sup> This provision "on its face precludes recovery of punitive damages."<sup>3</sup> A similar limitation has been read into the Securities Act of 1933<sup>4</sup> because of "the potentially awesome injuries that such damages may impose."<sup>5</sup>

Plaintiffs now routinely circumvent these limitations, however, by adding a parallel state-law tort count to a complaint alleging a federal securities law violation. Proof of the elements of the federal claim will often establish the state claim as well,<sup>6</sup> and punitive damages

<sup>2</sup> 15 U.S.C. § 78bb(a) (1982).

<sup>3</sup> *Byrnes v. Faulkner, Dawkins & Sullivan*, 500 F.2d 1303, 1313 (2d Cir. 1977).

<sup>4</sup> 15 U.S.C. §§ 77 et seq. (1982).

<sup>5</sup> *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1285 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970). The Second Circuit explained that "[i]f all [who are affected by, for example, a misstatement in a prospectus] are permitted to recover not only compensatory damages but 'smart money' as well the sum of the liabilities could well bankrupt an otherwise honest underwriter . . . ." *Id.* The amount that any given jury thinks it will take to make a securities firm "smart" may be multiplied many times where there is no way "to circumscribe all possible plaintiffs in a single suit . . . or predict how many suits will arise from any particular violation." *Id.*

<sup>6</sup> See, e.g., *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 324 (5th Cir. 1981) ("upon proving the three requisite elements of a federal securities law churning violation, the investor will, in most or perhaps all cases, be entitled to hold the broker liable under a pendent state claim for breach of fiduciary duty"); *Sawyer v. Raymond, James & Assocs., Inc.*, 642 F.2d 791, 793 (5th Cir. 1981) (federal securities claims for fraudulent misrepresentation are "inextricably tied" to common law claims of fraud, breach of fiduciary responsibility, and negligence); *Cunningham v. Dean Witter Reynolds, Inc.*, 550 F. Supp. 578, 582 (E.D. Cal. 1982) ("In truth, the claims under Rule 10b-5 and the common law

thus become available notwithstanding the federal prohibition; it is "well established that exemplary damages may be awarded if allowable under state law when a state law violation is joined with the [SEC Rule] 10b-5 complaint."<sup>7</sup>

Punitive damage awards against securities firms, in amounts determined by the virtually unconstrained discretion of juries, are now common. A typical example is *Arceneau v. Merrill Lynch, Pierce, Fenner & Smith Inc.*,<sup>8</sup> where a jury awarded \$46,675 in compensatory damages for excessive trading ("churning") in a customer's securities account and added \$300,000 in punitive damages. The court of appeals affirmed essentially without analysis: "In Florida, it is within the jury's discretion whether or not to award punitive damages and to determine the amount which should be awarded."<sup>9</sup> The only outer limit the court mentioned was a possible bar against awards so large as to "destroy [the] company economically."<sup>10</sup>

breach of duty, fraud, and negligence claims appear to be nothing more or less than compatible theories of liability for the same basic tort. . . .").

<sup>7</sup> *Coffee v. Permian Corp.*, 474 F.2d 1040, 1044 (5th Cir.), cert. denied, 412 U.S. 920 (1973).

<sup>8</sup> 767 F.2d 1498 (11th Cir. 1985).

<sup>9</sup> *Id.* at 1503.

<sup>10</sup> Juries are not the only source of outlandish awards. In *Luckett v. Finkelberg*, No. 26,966 (Ch. Ct. Rankin County, Miss. July 14, 1988), appeal pending, the Chancellor awarded the plaintiff compensatory damages of \$13,571 because of an erroneous payment to the plaintiff's divorced wife out of a joint account at the defendant firm. After receiving evidence of the firm's net worth, the Chancellor tacked on punitive damages of \$1,500,000. Following *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254 (Miss. 1985), aff'd 108 S. Ct. 1615 (1988), he said the award "should be given as an example and warning to others, punishment for wrongdoing, and to deter similar conduct in the future."

There are many recent similar examples. In *Hill v. Bache Halsey Stuart Shields Inc.*,<sup>11</sup> a customer of a commodity futures broker sued the firm for "breach of fiduciary duty" after a \$50,000 loss in his account. The jury awarded \$47,000 in compensatory damages and \$2,000,000 in punitive damages. The court of appeals reversed on the ground that the trial judge had not sufficiently defined "fiduciary duty" for the jury, but the court added, "[o]n retrial, we do not foreclose a possible award of punitive damages."<sup>12</sup> In *Aldrich v. Thomson McKinnon Securities, Inc.*,<sup>13</sup> the jury awarded \$175,000 in compensatory damages for "churning" and added \$3,000,000 in punitive damages. The court of appeals reduced the punitive damages to \$1,500,000, reciting a duty "to keep a verdict for punitive damages within reasonable bounds."<sup>14</sup> In *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*,<sup>15</sup> on a trading loss of \$30,000, the jury awarded \$30,000 for the loss, \$1,000,000 in compensatory damages for "intentional infliction of emotional distress," and an additional \$3,000,000 in punitive damages. The court of appeals affirmed an award of punitive damages against the firm, but it reduced the punitive amount to \$1,000,000 because "we are convinced that the \$3,000,000 award is excessive."<sup>16</sup> In a particularly dramatic recent case, *Davis v. Merrill Lynch, Pierce, Fenner & Smith Inc.*,<sup>17</sup> the jury awarded \$20,000 in compensatory damages for unauthorized and excessive

<sup>11</sup> 790 F.2d 817 (10th Cir. 1986).

<sup>12</sup> *Id.* at 827.

<sup>13</sup> 756 F.2d 243 (2d Cir. 1985).

<sup>14</sup> *Id.* at 249 (citation omitted).

<sup>15</sup> 703 F.2d 1152 (10th Cir.) (en banc), cert. denied, 464 U.S. 824 (1983).

<sup>16</sup> *Id.* at 1177.

<sup>17</sup> No. 85-4170 (S.D.S.D. May 20, 1987), appeal pending.

trading and tacked on \$2,250,000 in punitive damages (112.5 times the compensatory award). The district court gave the plaintiff the choice of a reduced punitive award of \$400,000 (20 times the compensatory award) or a new trial; the plaintiff chose the latter and was awarded \$100,000 in compensatory damages and \$2,000,000 in punitive damages by the second jury.

Securities firms are among the defendant groups particularly vulnerable to arbitrary punitive awards. First, it is inherent in their business that some customers will suffer losses, and even though the fact of loss is no evidence at all of misconduct by the firm, the loss helps command the jury's sympathy and may cause it to infer misconduct from otherwise ambiguous evidence.

Second, many securities firms are large and most are perceived as wealthy, powerful, and distant. As the Second Circuit suggested in *Globus*,<sup>18</sup> punitive damages are awarded in amounts the jury thinks will make the defendant "smart": as in the present case, juries are routinely urged to "send a message"<sup>19</sup> and instructed to consider the defendant's "financial standing."<sup>20</sup> And appellate courts test punitive awards (as the court below did<sup>21</sup>) largely or even exclusively by the defendant's size.

Third, securities firms (among others) are vulnerable to being punished by a jury for imagined misconduct not involved in the case at bar. Juries are often told that they may take into account such nebulous factors as the

<sup>18</sup> 418 F.2d at 1285.

<sup>19</sup> Pet. App. 30a, 32a-35a; see, e.g., *Malandris*, 703 F.2d at 1183.

<sup>20</sup> C.A. App. 1180; see *Malandris*, 703 F.2d at 1177 ("economic status").

<sup>21</sup> Pet. App. 11a.



defendant's "character,"<sup>22</sup> the effect of the defendant's conduct on persons not involved in the case,<sup>23</sup> and "the deterrent effect of the award on others."<sup>24</sup> Such instructions may allow (or even encourage) juries to avenge personal grudges and perceived evils.

Finally, the amici and other major securities firms compete vigorously in a global arena. Their international competitors have client bases in countries whose tort systems do not expose them to random strikes of lightning. The present regime of unpredictable punitive awards, often tens or hundreds of times the size of the underlying transactions, not only costs American firms the awarded dollars and legal expenses plus large amounts of management and staff time; it also deprives them of the ability to estimate costs, plan their business, and meet foreign firms on an equal footing in a now highly competitive world.

For these reasons, the amici have a strong interest in urging the Court (as we do in Part I of this Brief) to rule that (i) the Excessive Fines Clause applies to punitive damage awards, and (ii) the Clause limits punitive awards to amounts proportional to the wrong proved in the case at bar. In Part II, we argue that the Court should move to reduce arbitrary jury awards and ad hoc appellate review by encouraging state legislatures to adopt well-defined standards for punitive damages.

<sup>22</sup> *E.g.*, Pet. 6; *Holcroft v. Missouri-Kansas-Texas R.R. Co.*, 607 S.W.2d 158, 164 (Mo. App. 1980).

<sup>23</sup> *E.g.*, *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 331 (5th Cir. 1981); *Safeco Ins. Co. v. Ellinghouse*, 725 P.2d 217, 227 (Mont. 1986).

<sup>24</sup> *Malandris*, 703 F.2d at 1177.

## SUMMARY OF ARGUMENT

1. Punitive damages are "fines" within the meaning of the Excessive Fines Clause. The language and history of the Clause demonstrate that it was intended to protect against the arbitrary use of the power to punish by monetary exaction, whether the proceeding is denominated criminal or civil. As the word "punitive" makes clear, such damages "are awarded not to compensate for injury but, rather, 'to punish reprehensible conduct and to deter its future occurrence.'"<sup>25</sup>

Punitive damages are "excessive" when they are not proportionate to the misconduct proved in the case at bar. Magna Carta said "[a] freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence . . . ." Those great words were the source of the Eighth Amendment's briefer phrase "nor excessive fines imposed," and the Founders meant to express the same principle of proportionality. This Court has also consistently applied the principle of proportionality in other Eighth Amendment contexts.

The laws of Vermont and other states do not effectively limit punitive awards to amounts proportionate to the wrong proved. To the contrary, state law commonly requires, as it did here, that the jury be told that it has virtually unlimited discretion to impose what it considers an appropriate penalty. When the jury is given any guidance, it is typically told, as here, that the wealth of the defendant is a principal factor. Such instructions allow, and may even invite, the jury to punish perceived wrongs not at issue in the case before it, and

<sup>25</sup> *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1655 (1988) (O'Connor, J., concurring) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

<sup>26</sup> W. McKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 284 (2d rev. ed. 1914).

to impose punishment in arbitrary, unpredictable and excessive amounts.

2. The Court's ruling in this case can encourage state legislatures to adopt appropriately detailed standards for making such awards. Standard-setting legislation would reduce the arbitrariness of the awards and would lead to more meaningful and less frequent appellate review.

Because proportionality depends in part on contemporary views of the seriousness of particular wrongs, there is an important role for legislatures to play. The Court can encourage them to act by making it clear that large awards will not be sustained unless they are based on sufficiently detailed standards to constrain discretion, and that courts should generally defer to clear and specific legislative judgments as to appropriate penalties. The Court has successfully followed a similar course under the Cruel and Unusual Punishment Clause.

Appropriate legislation would also specify the wrongs that may be penalized. As noted, an important source of the arbitrariness of punitive damage awards is the lack of clear definition of what the jury may punish. Ironically, legislatures that have been very concerned with defining crimes and prescribing criminal sentences have done much less to define the wrongs that may be the subject of civil punitive damages or to prescribe appropriate awards.

State legislation setting appropriately detailed standards for punitive damage awards would also reduce the burden on appellate courts, who now review punitive awards on an unsatisfactory ad hoc basis. With appropriate legislated standards in place, an appellate court would need to intervene only in the rare case where a legislated standard itself exceeded constitutional bounds, or to correct the misapplication of the law in a particular case.

## ARGUMENT

### I. THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT PROTECTS PERSONS AGAINST PUNITIVE DAMAGE AWARDS DISPROPORTIONATE TO THE WRONG AT ISSUE.

#### A. Punitive Damages Awarded in Civil Cases Constitute "Fines" Within the Meaning of the Eighth Amendment.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, *nor excessive fines imposed, nor cruel and unusual punishments inflicted.*"<sup>27</sup> This Court has never decided whether the Excessive Fines Clause applies to civil fines, such as punitive damage awards;<sup>28</sup> indeed, the Court has rarely had occasion to discuss the Clause at all. But the language and history of the Clause, as well as the penal nature of punitive damages, make it clear that the Clause should apply to punitive damage awards.

<sup>27</sup> U.S. CONST. Amend. VIII (emphasis supplied).

<sup>28</sup> Nor has the Court yet held that the Excessive Fines Clause applies to the states. The Court has incorporated both the Cruel and Unusual Punishment Clause, *see Robinson v. California*, 370 U.S. 660, 666-67 (1962); *id.* at 675 (Douglas, J., concurring), and the Excessive Bail Clause, *see Schilb v. Kuebel*, 404 U.S. 357, 365 (1971). It seems clear that the rights protected by the Excessive Fines Clause are likewise "implicit in the concept of ordered liberty" and must be incorporated as well. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *see* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 148 (1986). The only cases holding to the contrary were decided long before the Court began incorporating the provisions of the Bill of Rights. *See, e.g., Eilenbecker v. District Court*, 134 U.S. 31 (1890) (holding that the Bill of Rights is not applicable to the states); *Pervear v. Commonwealth*, 72 U.S. (5 Wall.) 475 (1867) (holding that the Excessive Fines Clause is not applicable to the states).

To begin with, the Excessive Fines Clause does not use the words "criminal" or "crime."<sup>29</sup> The Framers used these words in other provisions of the Bill of Rights whose application was to be limited to criminal cases.<sup>30</sup> Although the Court has held that the Cruel and Unusual Punishment Clause, which does use the word "punishment," "was designed to protect those convicted of crimes,"<sup>31</sup> the reference to "fines" has a history that is plainly not limited to criminal exactions.

As the Court has recognized, the reference in the Clause to excessive "fines" can be traced directly to Magna Carta's prohibition of excessive "amercements," monetary penalties paid to the King in Norman England.<sup>32</sup> There was little distinction at the time between tort law and criminal law, and amercements were therefore neither strictly civil nor strictly criminal sanctions. But they were assessed for much misconduct that would be considered civil in nature today, such as usury, en-

<sup>29</sup> See *Ingraham v. Wright*, 430 U.S. 651, 685 (1977) (White, J., dissenting) (noting that "the Framers did not choose to insert the word 'criminal' into the language of the Eighth Amendment. . . .").

<sup>30</sup> See, e.g., U.S. CONST. Amend. V ("No person shall be held to answer for a capital, or otherwise infamous *crime*, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person . . . be compelled in any *criminal* case to be a witness against himself . . . .") (emphasis supplied); U.S. CONST. Amend. VI ("In all *criminal* prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .") (emphasis supplied).

<sup>31</sup> *Ingraham*, 430 U.S. at 684 (refusing to apply the Cruel and Unusual Punishment Clause to corporal punishment in public schools). On the other hand, the Court has assumed that the Excessive Bail Clause is applicable in civil cases. See *Carlson v. Landon*, 342 U.S. 524, 544-46 (1952).

<sup>32</sup> See *Solem v. Helm*, 463 U.S. 277, 284-86 (1983).

gaging in business without a license, poaching, and failing to appear in court.<sup>33</sup>

More modern learning also suggests that the scope of the Excessive Fines Clause should reach any monetary penalty whose purposes are penal, even if the proceeding is nominally civil. More than three decades ago, a plurality of the Court said that if a statute "imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal."<sup>34</sup> The Court elaborated on that principle a few years later in *Kennedy v. Mendoza-Martinez*,<sup>35</sup> when it held that divesting an American of citizenship for avoiding military service during wartime was in effect a penal sanction. More recently, in *Ingraham v. Wright*,<sup>36</sup> the Court reaffirmed this notion, stating that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment."<sup>37</sup>

Although they arise in civil cases, punitive damage awards are, as the very word "punitive" suggests, penal sanctions. They are intended to extract a payment greater than the compensation needed to make the plaintiff whole. As Justice O'Connor reiterated last Term, "[p]unitive damages are awarded not to compensate for

<sup>33</sup> See Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233, 1252 n.107, 1257-69 (1987); see also *Jeffries*, *supra* note 28, at 155 n.65.

<sup>34</sup> *Trop v. Dulles*, 356 U.S. 86, 96 (1958) (plurality opinion) (footnote omitted).

<sup>35</sup> 372 U.S. 144 (1963).

<sup>36</sup> 430 U.S. 651 (1977).

<sup>37</sup> *Id.* at 669 n.37; see also *United States v. Ward*, 448 U.S. 242, 248-49 (1980) (where a penalty is "so punitive either in purpose or effect" as to negate its civil label, it will be treated as criminal).



injury but, rather, 'to punish reprehensible conduct and to deter its future occurrence.'"<sup>38</sup> The Court has made it clear that retribution and deterrence—the traditional goals of criminal punishment—are not "legitimate non-punitive governmental objective[s]." <sup>39</sup>

Awards equalling a hundred or more times the plaintiff's loss have no conceivable rationale except as punishment. Although the payment is made to the plaintiff, he is perceived as an instrument of justice: in fact, some courts have referred to plaintiffs seeking punitive damages as "private attorneys general."<sup>40</sup> And the fact that the virtually unlimited power to punish has been given to a civil jury rather than the King (or a federal or state official) does not make the punishment any less arbitrary or oppressive; to the contrary, the absence of legislative definition of the "crime" or prescription of the penalty simply makes the exercise of the power to punish more erratic and unpredictable. For these reasons, the strictures of the Eighth Amendment should be made applicable to the award of punitive damages.

**B. The Excessive Fines Clause Bars Punitive Damage Awards That Are Not Proportionate to the Wrong Committed.**

A large punitive damage award is "excessive" if it is not constrained by standards that require it to be proportionate to the wrong committed. As the Court stated long ago, the difference between excessive and just pun-

<sup>38</sup> *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1655 (1988) (O'Connor, J., concurring) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); see also *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) (punitive damages "serve the same function as criminal penalties and are in effect private fines").

<sup>39</sup> *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979).

<sup>40</sup> See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5th Cir.), cert. denied, 478 U.S. 1022 (1986); *Thiry v. Armstrong World Indus.*, 661 P.2d 515, 518 (Okla. 1983).

ishment is the "difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."<sup>41</sup> Arbitrary, large punitive damage awards exemplify such "unrestrained power."

Even standing alone, the phrase "excessive fines" suggests that its authors were referring to fines so large as to be disproportionate to the misconduct at issue. The history of the Excessive Fines Clause also suggests that proportionality is the key. The chapter of Magna Carta from which the Clause is drawn specifically articulated a requirement of proportionality between any "amercement" and the offense at issue.<sup>42</sup> As this Court has noted,<sup>43</sup> that requirement was carried forward in the English Bill of Rights<sup>44</sup> in language the Framers in turn adopted almost verbatim in the Eighth Amendment.

In interpreting the Cruel and Unusual Punishment Clause, this Court has applied a proportionality prin-

<sup>41</sup> *Weems v. United States*, 217 U.S. 349, 381 (1910).

<sup>42</sup> Magna Carta provided:

A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence, yet saving always his "contenement"; and a merchant in the same way, saving his "merchandise"; and a villain shall be amerced in the same way, saving his "wainage"—if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.

W. McKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 284 (2d rev. ed. 1914).

<sup>43</sup> See *Solem v. Helm*, 463 U.S. 277, 284-86 (1983).

<sup>44</sup> 1 Wm. & Mary sess. 2, ch. 2 (1689).

principle.<sup>45</sup> For example, in *Solem v. Helm*,<sup>46</sup> the Court affirmed the vacation of a life sentence imposed under a recidivist statute for passing a \$100 bad check. After reviewing the "English principle of proportionality" established by Magna Carta, the Court found it to be "deeply rooted and frequently repeated in common-law jurisprudence"<sup>47</sup> and held that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted."<sup>48</sup> Observing that "the Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments,"<sup>49</sup> the Court further noted that the proportionality principle applies to the Excessive Bail and Excessive Fines Clauses.<sup>51</sup>

<sup>45</sup> See, e.g., *Coker v. Georgia*, 433 U.S. 584, 601 (1977) (Powell, J., concurring) (rejecting the death penalty as "a disproportionate punishment for the crime of raping an adult woman"); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (opinion of Justices Stewart, Powell, and Stevens, JJ.) (holding that death is not "invariably disproportionate to the crime [of murder]," as long as the risk of arbitrary imposition of the death sentence is minimized through proper safeguards); *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (Brennan, J., concurring) (stating that "[i]f there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive") (citations omitted); *Robinson v. California*, 370 U.S. 660, 667 (1962) (reversing a minimum 90-day prison sentence following a conviction for narcotics addiction and explaining that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"); *Weems v. United States*, 217 U.S. 349 (1910) (reversing a fifteen-year sentence of hard labor in chains for falsifying a public document).

<sup>46</sup> 463 U.S. 277 (1983).

<sup>47</sup> *Id.* at 286.

<sup>48</sup> *Id.* at 284.

<sup>49</sup> *Id.* at 290.

<sup>50</sup> *Id.* at 289 (citation omitted).

<sup>51</sup> The Court has also applied this principle under the Excessive Bail Clause, albeit modified to take into account the purpose of bail.

[Continued]

Even the simple enunciation of a proportionality principle, without any extended elaboration, would condemn many of the now-frequent multi-million dollar punitive damage awards. The securities cases cited above provide good examples. All involve plaintiffs who put their assets at risk voluntarily, expecting them to be handled lawfully and professionally but understanding that the market has losers as well as winners. The tort system, and the federal securities laws, provide protection in the event of wrongdoing; in each case, the plaintiff obtained actual damages that fully compensated for any economic loss. But, to use *Malandris*<sup>52</sup> as an example, there is no sense in which \$3,000,000 (or even the \$1,000,000 permitted on appeal) is "proportionate" to a \$30,000 trading loss. No one (other than the jury in the single case at issue) had made a considered judgment that wrongs of this sort justify a multiple of 33 to 1. Such a standardless imposition of massive punishments breaks through the constitutional guarantees that the Excessive Fines Clause was designed to provide.

### C. The Damages in This Case Were Not Limited to an Amount Proportionate to the Misconduct at Issue.

In this case, the jury was instructed that "[i]n determining the amount of punitive damages, if any, you may take into account the character of the defendants, their financial standing, and the nature of their acts."<sup>53</sup> This unbounded discretion to choose the size of

<sup>52</sup> [Continued]

In *Stack v. Boyle*, 342 U.S. 1 (1951), the Court made it clear that the bail must not be set at a figure higher than reasonably calculated under the circumstances to secure the presence of the accused at trial. The Court ruled that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment." *Id.* at 5.

<sup>53</sup> *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152 (10th Cir.) (en banc), cert. denied, 464 U.S. 824 (1983).

<sup>54</sup> Pet. App. 6.



the penalty was entirely consistent with state law: As the court of appeals noted, "Vermont law, which applies here, invests a jury with enormous discretion to award punitive damages when it decides that a party has acted maliciously."<sup>54</sup>

Such unconstraining instructions are all too typical. Instead of being told that they should carefully measure any punitive damage award against the severity of the wrong in the case at hand, many juries are told that there is no rule at all to help guide their discretion. For example, the pattern instructions used in Maryland tell juries that:

[t]here is no exact rule by which to determine the amount of punitive damages. You may fix such amounts as in the exercise of your sound judgment and discretion you find will serve to punish the defendant and deter others from similar acts.<sup>55</sup>

Indeed, in some states juries may not even be told that punitive damages must bear a reasonable relationship to compensatory damages.<sup>56</sup>

<sup>54</sup> Pet. App. 10a (opinion of the court of appeals) (citations omitted).

<sup>55</sup> MARYLAND CIVIL PATTERN JURY INSTRUCTIONS, MPJI 10:6(e) (2d ed. 1984); see, e.g., J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 1103 (1985) (reproducing California pattern jury instruction explaining that "[t]he law provides no fixed standard as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice"); *id.* at § 11.06 (reproducing New York pattern jury instruction explaining that jury should award punitive damages in "such amount as in the exercise of your sound judgment and discretion you find will serve to punish the defendant and deter others from similar acts").

<sup>56</sup> See, e.g., *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 533 (Fla. 1985) (discussing *Lassiter v. International Union of Operating Engineers*, 349 So. 2d 622 (Fla. 1976)).

To the extent that instructions do provide factors for juries to consider, the emphasis is often placed not on proportionality to the wrong but on the wealth of the defendant. Pattern jury instructions typically not only list the size, financial condition, or wealth of the defendant as a legitimate factor; they permit the jury to apply this factor essentially independently of the wrong at issue.<sup>57</sup> Here, the trial judge referred in his instructions to defendants' "financial standing" even before he referred to "the nature of their acts," and the award was sustained almost entirely by reference to defendants' revenues, net worth, and income.<sup>58</sup>

The result is that in many cases brought against substantial corporate defendants the net worth of the defendant is, as a practical matter, the dominant factor in determining the size of the award. Elsewhere this Court has warned that punitive damages can sometimes "be employed to punish unpopular defendants."<sup>59</sup> But open permission to take into account "financial standing," together with the typical plaintiff's argument that a substantial award is needed to "send a message" to a large and insensitive corporation, lead repeatedly—as here—to disproportionate, excessive awards.

The award in this case—more than a hundred times the jury's own dollar measure of the misconduct—is clearly disproportionate to any measure of the misconduct at issue. The tort was one in which both the harm to the plaintiff and any expected gain to the defendant were purely economic. The plaintiff's damages and the

<sup>57</sup> See, e.g., J. GHIARDI & J. KIRCHER, *supra* note 55, at §§ 11.05, 11.08, 11.10, 11.18 (reproducing pattern jury instructions of Minnesota, Oregon, and Wisconsin, respectively); MARYLAND CIVIL PATTERN JURY INSTRUCTIONS, *supra* note 55, MPJI 10:6(e).

<sup>58</sup> See Pet. App. 11a.

<sup>59</sup> *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50-51 n.14 (1979).



defendant's wrong were therefore easily measurable. But the jury was not told that its award must be proportionate to those measures or to anything else, and the award it imposed vastly exceeds any amount that might be thought necessary to compensate the plaintiff, deprive the defendant of any gain, deter similar conduct, or punish wrongdoing. Whatever the standard, the award in this case is excessive and should be reversed.

## II. THE COURT'S RULING IN THIS CASE CAN ENCOURAGE STATE LEGISLATURES TO ADOPT APPROPRIATELY DETAILED STANDARDS FOR PUNITIVE DAMAGES, REDUCING BOTH THE ARBITRARINESS OF JURY AWARDS AND THE NEED FOR APPELLATE REVIEW.

The award in this case is so disproportionate that it must fall even under an "I know it when I see it" test.<sup>60</sup> This does not mean, however, that application of the Excessive Fines Clause to punitive damage awards will always require ad hoc decisions by appellate courts. To the contrary, a ruling by this Court that the Clause imposes a proportionality requirement on large punitive damage awards may well encourage state legislatures to formulate appropriately detailed proportionality standards, reducing the arbitrariness of jury awards and the number of occasions for ad hoc appellate review.

### A. This Court Can Effectively Encourage Legislative Adoption of Standards That Would Largely Cure the Problem of "Excessiveness."

No absolute scale can determine in every case whether a punitive damage award or other fine is disproportionate and therefore "excessive." Excessiveness, like cruel and unusual punishment,<sup>61</sup> is in part a matter of tether-

<sup>60</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>61</sup> See *Solem v. Helm*, 463 U.S. 277, 291-92 (1983).

ing. A large fine is excessive if it cannot be justified by reference to appropriately detailed standards for what "punishment" fits what "crime."

There is therefore an important role for legislatures to play in making damage awards proportional and not "excessive": to set standards by which proportionality is defined. This suggests an appropriate two-part course for the Court to follow here. One part is to declare that the Clause requires large punitive damage awards to be viewed with great skepticism, and that such awards generally should be overturned as unconstitutional if they are not based on legal standards that make the punishment demonstrably fit the offense.<sup>62</sup> The other part is to make it clear that substantial deference would be given to clear and specific legislative judgments on appropriate penalties for specified types and degrees of misconduct.

The Court followed something very close to this course in the death penalty cases. The Court declared that unbridled jury discretion, resulting from a lack of legislative standards, could make application of the death

<sup>62</sup> See *Rookes v. Barnard*, [1964] A.C. 1129, 1227 (Devlin, L.J.) (footnotes omitted):

Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the *Wilkes* case, can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal; and, moreover, a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint. It may even be that the House may find it necessary to follow the precedent it set for itself in *Bonham v. Gambling*, and place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough.

penalty "cruel and unusual," and it effectively halted the use of the penalty until legislatures adopted appropriate standards.<sup>63</sup> As the Court put the point recently, "[t]he Eighth Amendment jurisprudence of this Court establishes [that] . . . sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses."<sup>64</sup> But the Court also made it clear that legislatures can help to define the meaning of "cruel and unusual." As three Justices explained, "[t]his is true in part because the constitutional text is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards."<sup>65</sup> Legislatures responded to these twin signals from the Court: "[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner [were] met by a care-

<sup>63</sup> See *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 408 U.S. 238 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>64</sup> *California v. Brown*, 479 U.S. 538, 541 (1987). Earlier, three Justices had noted that "[c]entral to the limited holding in *Furman* [*v. Georgia*, 408 U.S. 238 (1972),] was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments." *Woodson*, 428 U.S. at 302 (opinion of Stewart, Powell, and Stevens, JJ.). The lack of standards was not merely a "due process" violation; the Justices plainly had in mind a substantive element of the Eighth Amendment test.

<sup>65</sup> *Gregg*, 428 U.S. at 175 (opinion of Stewart, Powell, and Stevens, JJ.); see *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2691-92 & n.7 (1988) (analysis of "contemporary standards of decency as reflected by legislative enactments and jury sentences"). In *McCleskey v. Kemp*, 107 S. Ct. 1756, 1771 (1987), the Court discussed the indicia of contemporary standards of punishment as follows: "First among these indicia are the decisions of state legislatures, 'because the . . . legislative judgment weighs heavily in ascertaining' [contemporary] standards . . . ."

fully drafted statute that ensures that the sentencing authority is given adequate information and guidance."<sup>66</sup>

This history suggests that the Court can provide meaningful protection to the rights secured by the Excessive Fines Clause, without endless case-by-case definition of "excessive," by inviting legislatures to help solve the problem. To date, neither Congress nor most state legislatures have made much progress in this effort. Congress has considered various proposals over the years, but no reform legislation has come close to enactment.<sup>67</sup> In the states, a few legislatures have responded to insurance crises by enacting ceilings or new general standards for punitive damages.<sup>68</sup>

<sup>66</sup> *Gregg*, 428 U.S. at 195 (opinion of Stewart, Powell, and Stevens, JJ.).

<sup>67</sup> See, e.g., H.R. 1115, 100th Cong., 2d Sess. 6-7 (1988) (listing nine factors by which to measure appropriate punitive damage awards in product liability actions and generally precluding such awards when drugs or medical devices causing injury satisfy federal requirements); Amendment No. 1812 to S. 79, 100th Cong., 2d Sess. (1987), 134 Cong. Rec. S2976 (daily ed. Mar. 28, 1988) (similar); S. 2760, 99th Cong., 2d Sess. (1986), reported in S. Rep. No. 422, 99th Cong., 2d Sess. 13, 48-54 (1986) (generally precluding punitive damages in product liability actions where drug, medical device, or aircraft causing injury was subject to regulatory approval before marketing); S. 100, 99th Cong., 1st Sess. (1985), 131 Cong. Rec. S216 (daily ed. Jan. 3, 1985) (prescribing specific factors governing propriety and size of punitive damage awards in product liability actions).

<sup>68</sup> Two states recently imposed dollar ceilings on punitive damages recoverable in most civil actions. In Virginia, awards are now subject to a \$350,000 ceiling. VA. CODE ANN. § 8.01-38.1 (1988 Supp.). In Alabama, there is a \$250,000 ceiling on awards in cases not involving a pattern of intentional wrongful conduct, actual malice, or defamation. ALA. CODE § 6-11-21 (1988 Supp.). Alabama also requires both the trial court, upon motion, and the appellate court to review the size of the award independently. ALA. CODE §§ 6-11-23 to -24 (1988 Supp.).

Two other states recently established rebuttable presumptions of the maximum ratio of punitive damages to compensatory damages awarded. In Florida, in specified civil actions, a ratio of more



The reason for the lack of significant legislative progress at the state level may be that the interests of tort defendants, who will often be out-of-state or national firms, are less well-protected in the political process than the interests of local plaintiffs (and their local counsel).<sup>69</sup> Whatever the reason, this Court could provide an appropriate spur to more vigorous state consideration by making it clear that a state policy favoring substantial awards in a particular defined class of cases will be constitutionally enforceable only if there is a clear articulation of policy sufficient to eliminate the element of arbitrariness inherent in "unbridled discretion."<sup>70</sup>

**B. Appropriate Legislation Would Define the Wrongs That May Be Penalized and Would Constrain the Discretion To Assess the Size of Penalties.**

The key requirement of the Eighth Amendment is proportionality of the punishment to the offense. Legis-

than 3 to 1 is "presumed to be excessive." In addition, 60% of any punitive award is payable to the state. FLA. STAT. ANN. § 768.73 (West Supp. 1988). Colorado now provides that, in actions involving injury to individuals or property, punitive damages generally may not exceed the amount of compensatory damages. Colorado also provides, uniquely, that "evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages." COLO. REV. STAT. § 13-21-102 (1987).

Two other states have recently adopted new approaches. Montana now bifurcates jury liability and remedy proceedings. The judge must review any jury award of damages in light of eight factors, including the defendant's net worth. No ceiling is imposed on any resulting award. MONT. CODE ANN. § 27-1-221 (1987). Kansas now requires judges to determine the amount of punitive damages awarded based on seven factors, including the defendant's "financial condition." Kansas also places limits on the size of the award. KAN. STAT. ANN. § 60-3701 (1987 Supp.).

<sup>69</sup> See R. NEELY, THE PRODUCTS LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS 71-73 (1988).

<sup>70</sup> *California v. Brown*, 479 U.S. 538, 541 (1987).

latures can contribute to assuring proportionality by selecting the specific categories of wrongs that may be penalized and setting particularized standards that will constrain the jury's discretion in fixing the size of penalties and make penalties comparable in comparable cases.

It is ironic that legislatures have spent considerable time and effort to define particular categories of criminal conduct and to specify, often in great detail, the sentences justified for particular criminal offenses.<sup>71</sup> Notwithstanding the identity of purpose and the resulting threat to liberty, the legislatures' approach in the punitive damages area is in striking—even shocking—contrast. With rare exceptions, legislatures have not attempted to constrain jury discretion in setting the size of particular penalties, or to define the scope of the wrong that can form the basis for a punitive award. Another major benefit of appropriate legislative standards would be to reduce the risk of multiple punitive damage awards to different plaintiffs for the same single offense.<sup>72</sup>

<sup>71</sup> See, e.g., 28 U.S.C.A. §§ 991-998 (West Supp. 1988); see *Mistretta v. United States*, Nos. 87-7028, 87-1904, slip op. at 18 (U.S. Jan. 18, 1989) (upholding Sentencing Reform Act of 1984 as setting sufficiently specific guidelines to assure "proportionate penalties").

<sup>72</sup> As Judge Friendly noted two decades ago:

[Where one act has harmed many people] the apparent impracticability of imposing an effective ceiling on punitive awards in hundreds of suits in different courts may result in an aggregate which, when piled on large compensatory damages, could reach catastrophic amounts. . . . [A] sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin.

*Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967); see also *Byrnes v. Faulkner, Dawkins & Sullivan*, 550 F.2d 1303, 1314 (2d Cir. 1977); *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1285 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970).



Spurred to act by an appropriate ruling in this case, state legislatures could prescribe dollar formulas, dollar limitations, or damage standards that sufficiently tether the jury's discretion. Such legislation would assure that similar wrongs will be punished similarly. It would also make any punitive award that falls within the prescribed range non-excessive as a matter of law, so long as the legislative limitations and formulas themselves survive the limited constitutional scrutiny applicable to legislative acts.

**C. Legislated Punitive Damage Standards Would Lead to a More Limited and More Meaningful Role for Appellate Courts.**

Members of the Court noted in the death penalty cases that one important consequence of adequate jury instructions is that they permit "the judiciary to check arbitrary and capricious exercise of [the sentencing] power."<sup>73</sup> As the same three Justices put the point in *Gregg*, "[w]here the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner."<sup>74</sup>

The same is plainly true of very large fines. As stated above, "excessiveness" is in part a matter of comparison. Only if the initial fact finder is given adequate standards can a reviewing court determine that an award is not capricious and therefore not excessive.

Meaningful appellate review of Excessive Fines Clause challenges does not mean an increased or unmanageable burden on appellate courts. To the contrary, appellate

<sup>73</sup> *Woodson*, 428 U.S. at 303 (opinion of Stewart, Powell, and Stevens, JJ.).

<sup>74</sup> *Gregg*, 428 U.S. at 195 (opinion of Stewart, Powell, and Stevens, JJ.).

courts now have frequent occasion to review the size of punitive awards, but their review often consists of substituting their own unexplained judgment for that of the jury.<sup>75</sup> Such ad hoc determinations of whether an award is "too high" are both unsatisfying to the court and the litigants and unenlightening for future cases. If the jury had been properly instructed in the first place, the appellate court (or the trial judge on a motion for remittitur) would need to intervene only to protect against the erratic or unreasoned application of law to fact.

When punishments have been legislatively set or constrained, the task of a reviewing court is a limited one: "[i]n view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate."<sup>76</sup> Once appropriate legislative standards and instructions on proportionality are in place, the deference due to the fact finder's exercise of discretion should considerably narrow the range of constitutional review. The issue posed by the proportionality test is a familiar one for judges; as the Court indicated in *Solem*, judgments about appropriately proportional penalties for misconduct are ones "courts traditionally have made . . . ." <sup>77</sup> While appellate courts will, of course, have

<sup>75</sup> See, e.g., *Aldrich v. Thomson McKinnon Sec., Inc.*, 756 F.2d 243, 248-49 (1985) (reducing punitive damage award from \$3 million to \$1 million because "we are convinced . . . that \$3 million goes considerably beyond what may fairly be justified in order to discourage repetition"); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1177-78 (10th Cir.) (en banc) (similar reduction), *cert. denied*, 464 U.S. 824 (1983).

<sup>76</sup> *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983).

<sup>77</sup> *Id.* at 292; see, e.g., *Wheatt v. State*, 410 So. 2d 479, 481-82 (Ala. Ct. App. 1982) (\$25,000 fine for cannabis trafficking was not excessive); *Walsh v. Gurman*, 132 Conn. 58, 64, 42 A.2d 362, 365

to be alert to identify abuses requiring further intervention, the issues will be familiar and judicially manageable.

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(treble damages under Federal Price Control Act "is not so disproportionate to the offense committed as to [violate the Excessive Fines Clause]"), *cert. denied*, 326 U.S. 719 (1945); *Traylor v. State*, 458 A.2d 1170, 1178 (Del. 1983) (\$75,000 fine for drug trafficking was "harsh, but not so harsh as to be disproportionate to [the] offense"); *Hindt v. State*, 421 A.2d 1325, 1333-34 (Del. 1980) (\$52,500 fine for failure to file reports pursuant to environmental statute was not excessive); *Sizemore v. Kentucky*, 485 S.W.2d 498, 500 (Ky. 1972) (\$2500 fine for assault was not excessive); *State v. Briggs*, 388 A.2d 507 (Me. 1978) (\$500 fine for nighthunting was not excessive); *State v. Trailer Serv., Inc.*, 61 Wis. 2d 400, 212 N.W.2d 683, 689 (1973) (upholding graduated fines for violations of truck weight limits: "For a [statutory] fine to be . . . excessive [under state constitutional provision with same wording as U.S. Constitution], it must be so disproportionate to the offense as to shock public sentiment . . ."); *cf. United States v. Busher*, 817 F.2d 1409, 1413-16 (9th Cir. 1987) (discussing applicability of *Solem's* proportionality requirement to criminal forfeiture imposed under RICO).

## CONCLUSION

The decision of the Court of Appeals for the Second Circuit should be reversed.

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**AMICUS CURIAE**

**BRIEF**



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., and  
BROWNING-FERRIS INDUSTRIES, INC.,  
v. *Petitioners,*

KELCO DISPOSAL, INC., and JOSEPH KELLEY,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF THE UNITED STATES  
CHAMBER OF COMMERCE, NATIONAL ASSOCIATION  
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UNITED STATES, INC., THE BUSINESS ROUNDTABLE,  
AMERICAN CORPORATE COUNSEL ASSOCIATION,  
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## QUESTIONS PRESENTED

1. Whether a punitive damages judgment presumptively violates the Excessive Fines Clause of the Eighth Amendment if the judgment is imposed pursuant to state laws that provide unchanneled jury discretion on the issues of whether to award punitive damages and what amount of punitive damages to impose, and that also provide no objective standard for judicial review of punitive damages awards.

2. Whether a punitive damages judgment for wrongful pricing activities violates the Excessive Fines Clause if it exceeds (1) the maximum legislatively established criminal fines for conduct of the same or similar gravity, (2) the maximum legislatively established civil fines for conduct of the same or similar gravity, (3) the maximum legislatively fixed punitive damages awards for misconduct of the same or similar gravity, and (4) the maximum discretionary punitive damages award judicially approved for conduct of the same or similar gravity in the same state.

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IN THE  
**Supreme Court of the United States**  
 OCTOBER TERM, 1988

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No. 88-556

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*Respondents.*

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On Writ of Certiorari to the United States  
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AMICUS CURIAE BRIEF OF THE UNITED STATES  
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 RISK AND INSURANCE MANAGEMENT SOCIETY, INC.,  
 PRODUCT LIABILITY ADVISORY COUNCIL, INC.,  
 AND THE PRODUCT LIABILITY ALLIANCE  
 IN SUPPORT OF THE PETITIONERS

---

STATEMENT OF INTEREST

The United States Chamber of Commerce, National Association of Manufacturers, Motor Vehicle Manufacturers Association of the United States, Inc., the Business Roundtable, American Corporate Counsel Association, Risk and Insurance Management Society, Inc., Product Liability Advisory Council, Inc., and the Product Liability Alliance, with the consent of the parties, hereby file this



brief as *amici curiae* in support of the Petitioners.<sup>1</sup> The *amici* and their members represent the interests of the nation's business and manufacturing community.

The U.S. Chamber of Commerce is America's largest federation of businesses, representing more than 180,000 companies, several thousand trade and professional associations, and hundreds of state and local Chambers of Commerce. The National Association of Manufacturers is an association of approximately 13,500 companies and subsidiaries that together employ 85% of all manufacturing workers in the United States and produce more than 80% of the nation's manufactured goods. The Motor Vehicle Manufacturers Association is a trade association whose member companies build motor vehicles and manufacture industrial, lawn and agricultural equipment, construction and mining machinery, locomotives, railroad-rolling stock, winches and gasoline and diesel engines for various industrial and agricultural uses.

The Business Roundtable is an association of some 200 chief executive officers of companies from a variety of businesses and geographic locations who examine public issues that affect the economy and develop positions which seek to reflect sound economic and social principles.

The American Corporate Counsel Association is a national bar association of approximately 7500 attorneys from the legal staffs of corporations and other business entities in the private sector who are called upon to advise their clients regarding litigation and settlement of claims filed against them. The Risk and Insurance Management Society, Inc., the world's largest association of risk management professionals, consists of approximately 4,200 industrial and service corporations, governmental bodies and nonprofit organizations.

The Product Liability Advisory Council, Inc., is an association of industrial companies that was formed for

<sup>1</sup> Consent letters have been filed with the Clerk.

the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. The Product Liability Alliance consists of more than 300 manufacturing businesses, wholesaler-distributors and trade associations from a wide range of industries, and was formed in 1981 for the purpose of seeking uniform federal product liability laws.

This case is of interest to the *amici* because their members and clients are the primary victims of a punitive damages system which the legislatures and the trial and appellate courts have failed to exercise their constitutional duties to control. As the principal voice of the business and manufacturing communities, the *amici* are well suited to present to the Court the effects of unrestrained, disproportionate punitive damage awards on commercial enterprises, and the reasons that such awards violate the Excessive Fines Clause of the Eighth Amendment.

#### STATEMENT OF THE CASE

This case arises out of a civil action brought by respondent Kelco Disposal, Inc. and Joseph Kelley ("Kelco") in the United States District Court in Vermont, alleging that petitioners Browning-Ferris Industries of Vermont, Inc. and Browning-Ferris Industries, Inc. ("Browning-Ferris") attempted to monopolize the waste-disposal industry in Burlington, Vermont. A jury returned a verdict for Kelco of \$51,146 in compensatory damages on a federal antitrust count, and \$51,146 in compensatory damages and \$6 million in punitive damages on a state law count of tortious interference with contractual relations. Petitioners attacked the \$6 million punitive damages award as a violation of the Excessive Fines Clause of the Eighth Amendment. The Court granted *certiorari* on December 5, 1988. *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 527 (1988).

## SUMMARY OF ARGUMENT

The Excessive Fines Clause of the Eighth Amendment requires proportionality between the gravity of wrongdoing and the fines that are imposed to punish and deter such wrongdoing, regardless of whether the fines are denominated criminal fines, civil fines, punitive damages awards fixed in amount by statute, or punitive damages awards imposed by juries exercising discretion. The required proportionality cannot systematically obtain, however, if the fines are imposed as punitive damages under laws that (1) only loosely define the conduct and culpability that must be proven before punishment can be imposed, (2) give juries unbridled discretion to choose whether or not to impose punishment once the requisite culpability has been established, (3) provide neither fixed limits nor cognizable standards to guide juries in deciding what amount of punishment to inflict, and (4) provide reviewing courts with no objective standard against which to determine the propriety of punitive damages awards. Because it would be purely fortuitous for punitive damages awarded under such a standardless system to promote proportionality or any other legitimate penal purpose, such awards presumptively violate the Excessive Fines Clause. At a bare minimum, such awards should be subject to heightened scrutiny.

In addition, even if punitive damages are imposed pursuant to guidelines that pass constitutional muster, the proportionality, and therefore the constitutionality, of any particular punishment must be determined by reference to objective standards. At a bare minimum, when a state establishes no standards for determining punitive damages awards, an award violates the Excessive Fines Clause if it exceeds (1) the maximum legislatively established criminal fines for conduct of the same or similar gravity, (2) the maximum legislatively established civil fines for conduct of the same or similar gravity, (3) the maximum legislatively fixed punitive damages awards for misconduct of the same or similar gravity,

and (4) the maximum discretionary punitive damages award judicially approved for conduct of the same or similar gravity in the same state.

## STATEMENT

Punitive damages are penal in nature. Punitive damages are intended not to compensate plaintiffs, but to punish defendants, and to deter persons similarly situated from acting improperly in the future.<sup>2</sup> Because of the characteristics described below, the punitive damages systems in most states fail to further their legitimate purposes.

### A. Primary Characteristics of the Prevailing Punitive Damages System

The punitive damages system that exists in the United States today is characterized by: (1) an absence of clear standards for defining the conduct and culpability on which punitive damages may be based; (2) an absence of any standard to determine whether punitive damages should be awarded, once the requisite culpability has been found; (3) an absence of standards for determining the appropriate amount of punitive damages; (4) an absence of objective standards for judicial review; (5) an inappropriate burden of proof; (6) the admissibility of prejudicial evidence of the defendant's wealth even during the trial of liability and compensatory damages issues; and (7) in mass product liability and tort cases, the imposition of multiple punishments for a single act.<sup>3</sup>

<sup>2</sup> See W. Prosser & W.P. Keeton, *The Law of Torts* § 2, at 9 (5th ed. 1984); C. McCormick, *Handbook on the Law of Damages* § 77, at 275 (1935); D. Dobbs, *Handbook on the Law of Remedies* § 3.9, at 204 (1973); W. Prosser, J. Wade & V. Schwartz, *Torts: Cases and Materials* 528-29 (8th ed. 1988); M. Franklin & R. Rabin, *Tort Law and Alternatives: Cases and Materials* 622 (4th ed. 1987). See also *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

<sup>3</sup> The first four of these characteristics were present in this case; the last three are additional problems that elsewhere contribute to excessive punitive damages awards.



**1. The Absence of Clear Standards for Defining Conduct and Culpability on Which Punitive Damages May Be Based**

The terms used by state courts to describe the conduct or culpability that must serve as the basis for an award of punitive damages are diverse, contradictory and, in most cases, hopelessly vague.<sup>4</sup> In this case, for example, the district court instructed the jury that punitive damages could be based on "extraordinary misconduct," "outrageous conduct," or "a willful and wanton or reckless disregard of the plaintiff's rights." C.A. 1180. Juries in other states are told to impose damages if they find that the defendant acted with "wanton or reckless disregard for the rights of others." See, e.g., *American Laundry Machinery Industries v. Horan*, 412 A.2d 407, 419 (Md. Ct. Spec. App. 1980). Other states say that "gross negligence" is enough. See Tex. Civ. Prac. & Rem. Code Ann. § 41.003 (Vernon 1987). Some speak of "rudeness" or mere "caprice." See *Newton v. Standard Fire Insurance Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976). None of those terms is defined or circumscribed by objective guidelines.

**2. The Absence of Standards for Determining Whether Punitive Damages Should Be Awarded, Once the Requisite Culpability Has Been Found**

Once it determines that a defendant's misconduct meets the threshold of culpability, the jury has unbridled discretion to award or withhold punitive damages. See W. Prosser & W.P. Keeton, *The Law of Torts*, supra n.2, § 3, at 14. The jury is given no standard or guideline describing how to exercise that discretion. The jury simply is instructed that it may award punitive dam-

<sup>4</sup> For a comprehensive survey of state laws concerning punitive damages, see R. Schloerb, R. Blatt, R. Hammesfahr & L. Nugent, *Punitive Damages: A Guide to the Insurability of Punitive Damages in the United States and Its Territories* (1988).

ages to the plaintiff if it finds the defendant acted with the requisite culpability. See, e.g., C.A. 1180.

**3. The Absence of Standards for Determining the Appropriate Amount of Punitive Damages**

The great majority of states, including Vermont, establish no standards or guidelines that juries or courts must use to determine the maximum permissible award in a case. No relationship is established between the harm caused and the size of the punitive award, or between compensatory damages and punitive damages. Nor is any relationship established to parallel criminal fines, civil fines, or prior punitive damages awards in the same jurisdiction. Unlike criminal fines and civil fines denominated as such, no standard is established to ensure that punishments in cases involving the same misconduct are approximately the same. Nor is there any amount of punitive damages that a jury may award under the general punitive damages laws.<sup>5</sup>

Generally, as in this case, no instruction is given as to what must be considered or what must not be considered by the jury in determining the amount of punishment. No instruction regarding the deterrent and retributive functions of compensatory damages and defense costs is given.

The clearest point in most instructions is an invitation to consider the defendant's wealth. See, e.g., *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 459-60 (1980); *Sturm, Ruger & Co. v. Day*, 594 P.2d

<sup>5</sup> A few states have enacted specific limitations on general punitive damages awards. See, e.g., Conn. Gen. Stat. Ann. § 52-240b (West 1988) (punitive damages limited to two times compensatory damages); Colo. Rev. Stat. § 13-21-102 (Supp. 1986) (punitive damages limited to amount of actual damages); Fla. Stat. Ann. § 768.73 (West Supp. 1988) (punitive damages limited to three times compensatory damages).



38, 47-48 (Alaska 1979). As a result, the jury's only meaningful guideline for determining the amount of a punitive award is often the size of the defendant's purse. See D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation, The Story Behind the Statistics* 21 (1987).

#### 4. *The Absence of Objective Standards for Judicial Review*

The absence of standards to support either an award of punitive damages or calculation of the amount undermines the effectiveness of the trial courts' power to invoke remittitur, and the appellate courts' power to reverse. Most appellate courts reduce punitive damages awards only if they somehow intuit them to be infected by "passion or prejudice." Others, such as courts in Vermont, will take action only if they somehow conclude that the award is "manifestly and grossly excessive." *Pezzano v. Bonneau*, 133 Vt. 88, 91, 329 A.2d 659, 661 (1974).

In making these determinations, the courts themselves do not apply objective standards. Instead they substitute their own subjective notions for those of the juries. As one court candidly conceded, "Our reaction is admittedly visceral." *Rosenbloom v. Metromedia, Inc.*, 289 F. Supp. 737, 749 (E.D. Pa. 1968), *rev'd on other grounds*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971).

#### 5. *Inappropriate Burdens of Proof*

The Constitution requires that criminal cases be proved "beyond a reasonable doubt" and that certain civil cases be proved by "clear and convincing evidence." *In re Winship*, 397 U.S. 358, 364, 368 (1970) (criminal proceedings); *Santosky v. Kramer*, 455 U.S. 745, 762 (1982) (civil custody proceedings). Nevertheless, for punitive damages, most courts have held that proof by a mere "preponderance of the evidence" standard is

enough. See J. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* § 9:12 (1985).<sup>6</sup>

#### 6. *Admissibility of Prejudicial Evidence*

Only five states require bifurcated proceedings separating the trial of punitive damages from other issues.<sup>7</sup> Thus, most plaintiffs who seek punitive damages may introduce evidence of the defendant's wealth during their case in chief. Although such evidence is admissible only for the narrow purpose of determining the amount of punishment, the jury cannot effectively exclude it in determining whether the defendant is liable, the amount of compensatory damages to award, and whether the culpability required for punitive damages has been established.

#### 7. *Multiple Punitive Damage Awards for a Single Act*

Manufacturers of products found by juries to be defective can be exposed repeatedly to punitive damage assessments.<sup>8</sup> The current punitive damages system has

<sup>6</sup> Several states recently have recognized the penal nature of punitive damages and have imposed a higher burden of proof. At least nineteen states now require proof by "clear and convincing evidence" for punitive damages. See, e.g., Ala. Code § 6-11-20 (Supp. 1987); Alaska Stat. § 09.17.020 (1986); *Linthicum v. Nationwide Life Insurance Co.*, 150 Ariz. 326, 723 P.2d 675 (1986); Cal. Civ. Code § 3294(a) (West 1989). One state, Colorado, uses proof "beyond a reasonable doubt," the level of proof used in criminal cases. See Colo. Rev. Stat. § 13-25-127(2) (Supp. 1986).

<sup>7</sup> See Conn. Gen. Stat. § 52-240b (Supp. 1987); Ga. Code Ann. § 51-12-5.1(d)(2) (Supp. 1988); Kan. Stat. Ann. § 60-3701 (Supp. 1987); Mo. Ann. Stat. § 510.263 (Supp. 1989) (bifurcation if requested by any party; Mont. Code Ann. § 27-1-221(7)(a) (1987). One state, New Jersey, has a trifurcated procedure. See N.J. Rev. Stat. § 2A:58C-5(c) (1987) (first proceeding on compensatory damages; second proceeding on punitive damages liability; third proceeding on the amount of punitive damages). Colorado does not allow evidence of the defendant's income or net worth to be considered at all. See Colo. Rev. Stat. § 13-21-102(6) (Supp. 1986).

<sup>8</sup> Serial trials frequently result in disparate punitive damage awards in different cases arising from exactly the same facts. For example, numerous product liability cases were filed against the

developed no effective way to account for this phenomenon—each jury visits the question as if it were the only one looking at punitive damages.

### B. Effects of the Current Punitive Damages System

A comprehensive analysis of jury verdicts in the United States prepared by the RAND Institute for Civil Justice shows that the growth in the average award in product liability suits "has been truly explosive, reflecting increases ranging from 200 to more than 1000 percent" from the period 1960-1964 to 1980-1984. D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends In Tort Litigation: The Story Behind The Statistics*, *supra*, p. 8, at 18. That explosion has been paralleled by a dramatic increase in both the frequency and the size of punitive damages awards against manufacturers.

Before 1970, for example, there was only one reported appellate court decision upholding an award of punitive damages in a product liability case, an award of \$250,000. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Today, hardly a month goes by without a multi-million-dollar punitive damages verdict against a manufacturer.<sup>9</sup>

manufacturer of the drug Bendectin. These claims have resulted in jury verdicts in favor of the defendant (*see, e.g., Will v. Richardson-Merrell, Inc.*, 647 F. Supp. 544 (S.D. Ga. 1986)); summary judgment for the defendant on the issue of liability for compensatory damages (*see, e.g., Lynch v. Merrell-National Laboratories, Div. of Richardson-Merrell, Inc.*, 830 F.2d 1190 (1st Cir. 1987) (affirming district court's grant of summary judgment for defendant because plaintiffs failed to show Bendectin caused birth defects)); summary judgment for the defendant on the issue of punitive damages (*see, e.g., Hagen v. Richardson-Merrell, Inc.*, 697 F. Supp. 334 (N.D. Ill. 1988)); and a jury verdict of a punitive damages award for \$75 million (*see Ealy v. Richardson-Merrell, Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 740 (D.D.C. Oct. 1, 1987) (punitive damages remitted to zero)).

<sup>9</sup> *See, e.g., Stambaugh v. International Harvester Co.*, 102 Ill. 2d 250, 464 N.E.2d 1011 (1984) (\$15 million punitive damages verdict,

The empirical data show that the standardless punitive damages systems described above, selectively aimed at corporations and other "deep pockets,"<sup>10</sup> have had drastically deleterious effects on the range of products made available to further the health, comfort, and productivity of the American public, and on the ability of manufacturers equitably to settle other claims. Some of these effects are discussed below.

### 1. Withdrawal of Products From the Marketplace

The general aviation industry produced 18,000 aircraft per year in 1978 and 1979, but fewer than 1,000 in 1988. *See* H.R. Rep. No. 748, 100th Cong., 2d Sess.

remitted to \$650,000); *Cessna Aircraft Co. v. Fidelity & Casualty Co.*, 616 F. Supp. 671, 673 (D.N.J. 1985) (\$25 million punitive damages verdict); *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. Ct. App. 1986) (\$100 million punitive damages verdict, remitted to \$10 million); *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987) (\$7.5 million punitive damages verdict); *Ealy v. Richardson-Merrell, Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 740 (D.D.C. Oct. 1, 1987) (\$75 million punitive damages verdict, remitted to zero); *Kemner v. Monsanto Co.*, 15 Prod. Safety & Liab. Rep. (BNA) 884 (Ill. Cir. Ct. Oct. 22, 1987) (\$16.25 million punitive damages verdict); *George v. Raymark Industries, Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 865 (Del. Super. Ct. Nov. 9, 1987) (\$75 million punitive damages verdict); *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988) (\$10 million punitive damages verdict); *Rajala v. Allied Corp.*, No. 82-2282K (D. Kan. Apr. 25, 1988), *appeal docketed*, (10th Cir. May 9, 1988) (\$60 million punitive damages verdict); *Masaki v. General Motors Corp.*, 16 Prod. Safety & Liab. Rep. (BNA) 225 (Haw. Ct. App. Feb. 29, 1988) (\$11.25 million punitive damages verdict), *petition for cert. filed*, 57 U.S.L.W. 3296 (U.S. Oct. 14, 1988); *Batteast v. Wyeth Laboratories, Inc.*, 172 Ill. App. 3d 114, 526 N.E.2d 428 (1988) (\$13 million punitive damages verdict); *FDIC v. W.R. Grace Co.*, 691 F. Supp. 87 (N.D. Ill. 1988) (\$75 million punitive damages verdict).

<sup>10</sup> *See* M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* 50 (1987); D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind The Statistics*, *supra* p. 8.



24 (pt. 1) (1987) (statement of Edward W. Stimpson, President, General Aviation Manufacturers Assoc., Before the House Subcomm. on Commerce, Consumer Protection and Competitiveness). The decreased production was heavily influenced by punitive damages awards in cases such as *Cannuli v. Cessna Aircraft Co.*, Nos. 80-3285, 81-2209, 82-1052 (D.N.J. 1984) (\$25 million).

United States manufacturers of medical equipment similarly have abandoned certain markets. For example, Puritan-Bennett, a major domestic manufacturer of hospital equipment, stopped making anesthesia gas machines in 1984 because of rising liability costs, leaving two foreign manufacturers to dominate a market once filled by a half-dozen competitors. See Brody, *When Products Turn into Liabilities*, *Fortune*, Mar. 3, 1986, at 22.<sup>11</sup>

This phenomenon affects even the so-called "leisure" industries. For example, in 1976 there were eighteen manufacturers of football helmets. Now there are two. See Brown, *Insurance Costs, Lawsuits Injure U.S. Sports*, *J. Com.*, July 13, 1988, at A1, col. 2, A14, col. 5.

## 2. Reduced Development of New and Useful Products

A 1988 Conference Board survey of 4,000 companies in the United States reported: "About a third of all the firms surveyed—and nearly half of those reporting major impacts—have decided against introducing new products because of liability fears." See E.P. McGuire, *The Impact of Product Liability*, vii (1988). Several specific examples of this phenomenon have been reported:

<sup>11</sup> An \$8 million punitive damages award against the sole manufacturer of the polio vaccine on the theory that it had produced the wrong type of vaccine (the Sabin rather than the Salk vaccine) "almost jeopardized the viability of the entire polio vaccination program." Fortunately, the decision was reversed by a four-to-three vote of the Kansas Supreme Court in *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 718 P.2d 1318 (1986). R. Willard & R. Willmore, *An Update on the Liability Crisis: Tort Policy Working Group* 51 (1987).

- The President of Unison Industries, Inc., explained that his firm is *withholding an advanced electronic ignition system for light aircraft from the market* because of the liability risk that might result from its release and use. *Id.*
- The Chairman of the Board of Union Carbide Corporation reported that his company decided to *forgo development of a suitcase sized kidney dialysis unit* because "we believed [the] size of any damage claims and the probable cost of defending ourselves, made the whole thing uneconomic." Remarks of W. Anderson at the Annual Meeting of National Association of Casualty and Surety Executives (Oct. 7, 1986). He further reported that "it was the same reason we decided to *forgo offering IV equipment and the food packages for intravenous feeding* to our medical oxygen customers. It would have been a good service and a good business, but the costs of defending ourselves against the inevitable lawsuits caused us to drop it." *Id.* at 3 (emphasis added).

Similarly, the Chairman and Chief Executive Officer of Monsanto Company reported that, because of the uncertain punitive damages system, Monsanto

abandoned a possible substitute product for asbestos just before commercialization, not because it was unsafe or ineffective, but because a whole generation of lawyers had been schooled in asbestos liability theories that could possibly be turned against the substitute.

See Mahoney, *Punitive Damages: The Courts are Curb-ing Creativity*, *N.Y. Times*, Dec. 11, 1988, § 3, at 3, col. 1.

The project director for the National Academy of Sciences report, *Confronting AIDS—Directions for Public Health, Health Care, and Research*, stated, "[T]his general climate of uncertainty is something that deters many pharmaceutical companies from being involved in



AIDS vaccine research." See *Insurance Costs Deter AIDS Vaccine*, 1 Liab. & Ins. Bull. (BNA), at 5 (Nov. 3, 1986).

### 3. Effects on Settlements

A study conducted by the United States Department of Justice on the liability crisis indicated that uncertainties in the punitive damages system "serve as a significant obstacle to the settlement process by giving the plaintiff unrealistic expectations of the value of his case even where the defendant has made a generous settlement offer." See R. Willard & R. Willmore, *An Update on the Liability Crisis: Tort Policy Working Group*, *supra* n.11. "It is close to impossible to negotiate sensibly with a plaintiff who believes that he can shoot for the moon." *Id.* (quoting Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. Mich. J.L. Ref. 575, 612 (1985)). Empirical data indicate that, in those claims in which claimants sought punitive damages, claim settlements rose an average of about ten percent. See ISO DATA, Inc., *Claim File Data Analysis: Technical Analysis of Study Results* 86-87 (Dec. 1988).

In sum, the lack of standards and arbitrariness of the punitive damages system has had a substantial and adverse impact on productivity in the United States.

## ARGUMENT

### I. PUNITIVE DAMAGES JUDGMENTS BASED ON UNCHANNELED JURY DISCRETION PRESUMPTIVELY VIOLATE THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT

The general punitive damages laws of Vermont and many other states give juries license to inflict such punishments arbitrarily and on the basis of prejudice. They permit juries to set the amount of punishment without reference to any cognizable standard. And they provide no objective standard for judicial review.

Under such systems, any relationship between the punishments imposed and the legitimate purposes of punishment is purely fortuitous. When a state chooses to employ a system that does little or nothing to ensure that punitive awards are even minimally channeled to promote their avowed legitimate purposes, punishments imposed under that system presumptively violate the Excessive Fines Clause of the Eighth Amendment.

#### A. The Excessive Fines Clause Requires Proportionality

In *Solem v. Helm*, 463 U.S. 277, 290 (1983), the Court held that the Eighth Amendment requires "that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Although the Court was there applying the Cruel and Unusual Punishment Clause to an excessive prison sentence, the Court observed that the amendment "imposes 'parallel limitations' on bail, fines, and other punishments." 463 U.S. at 289 (quoting *Ingraham v. Wright*, 430 U.S. 651, 664 (1977)). Also, in explaining why the Cruel and Unusual Punishment Clause requires proportionality for prison sentences, the Court took as beyond dispute that the Excessive Fines Clause requires proportionality for fines. See 463 U.S. at 288-90. Finally, in describing the proportionality requirement's roots in Magna Carta, the Court observed that the requirement derived from Magna Carta's prohibition against disproportionate amercements, which were "similar to a modern-day fine." 463 U.S. at 283 n.8 and accompanying text. Accordingly, *Solem* teaches that proportionality between the wrongs inflicted and the fines imposed is the bedrock requirement of the Excessive Fines Clause.<sup>12</sup>

<sup>12</sup> As shown at length by the brief *amicus curiae* submitted by *Golden Rule Insurance Co., et al.*, the history of the Excessive Fines Clause leaves no doubt that the clause was intended to apply to civil as well as criminal fines. See generally Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986);

**B. Punitive Damages Awards Based on Unchanneled Jury Discretion Fail to Provide Proportionality or to Promote Any Other Legitimate Penal Purpose**

The very essence of the proportionality requirement is consistency in the relationship between punishment and wrongdoing from case to case: the punishment imposed in one case for a particular misdeed must be similar in severity to punishments imposed in other cases for misdeeds of similar gravity, greater than punishments imposed in other cases for misdeeds of lesser gravity, and less than punishments imposed in other cases for misdeeds of greater gravity. Magna Carta indicated as much:

A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence . . . .

Magna Carta, ch. 20, *quoted in* W. McKechnie, *Magna Carta* 284 (2d ed. 1958). So has the Court. *See Solem*, 463 U.S. at 284-85. So, too, have moral philosophers of virtually every persuasion. *See generally* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 845-57 (1972), (discussing I. Kant, *The Philosophy of Law* 194-98 (W. Hastie transl. 1887); J. Bentham, *An Intro-*

*Note, Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 Cal. L. Rev. 1433, 1441-47 (1987); *Note, The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699 (1987). This Court has recognized punitive damages as a form of civil fine. *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist & Powell, JJ., & Burger, C.J., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting). This brief therefore does not further address the question of the Excessive Fines Clause's applicability to punitive damages judgments.

*duction to the Principles of Morals and Legislation* 178-91 (1789)).

The proportionality requirement is a vital corollary of the broader constitutional prohibition "against arbitrary and discriminatory punishment." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) (applying Due Process Clause). *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As the Court has recognized in a variety of contexts, the required consistency and prevention of arbitrariness and unjust discrimination cannot be achieved unless punishments are imposed pursuant to cognizable, objective standards. *See Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion) ("It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. . . . Otherwise, 'the system cannot function in a consistent and rational manner.'"); *cf. Giaccio*, 382 U.S. at 402 (Due Process Clause violated by "vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory imposition of costs"). In the absence of such standards, juries can silently base their decisions to punish, and the severity of their punishments, upon invidious discrimination, prejudice, and even whim. Every punishment so motivated, no matter how small, would be excessive. *See Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

Punishments therefore must be constrained by cognizable limits and guidelines fixed before the defendant has acted. *See United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute"); *Giaccio*, 382 U.S. at 405 n.8 (referring to constitutionality of allowing juries "to fix punishment within legally prescribed limits") (emphasis added).



A related constitutional infirmity in a system that allows the imposition of fines not limited by predetermined standards is this: such a system violates the principle of fundamental fairness reflected in the Constitution's proscription of *ex post facto* laws, a proscription that invalidates "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (1 Dall.) 386, 390 (1798) (Chase, J., separate opinion).<sup>13</sup>

Without predetermined standards for punishments, the *ex post facto* principle would be eviscerated. When a state's legislature and courts leave the size of fines to juries' unchanneled discretion, no fine of any magnitude can ever be said to have changed the punishment or to have inflicted a punishment greater than that allowed when the wrongdoing was committed.

The general punitive damages laws of Vermont and most other states violate these excessiveness principles. Because the jury's decision whether to award punitive damages, once the requisite culpability has been established, is unreviewable and may be based upon anything at all, it would be pure happenstance if any particular punitive award were to be proportionate to the wrongdoing committed or serve any other legitimate purpose. In other instances of the same (or more culpable) conduct by other defendants, juries may have awarded only compensatory damages and refrained, on the basis of bias, caprice, or sympathy, from awarding punitive damages. Cf. *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart,

<sup>13</sup> *Accord Lindsey v. Washington*, 301 U.S. 397, 401 (1937) ("The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."); *In re Medley*, 134 U.S. 160, 171 (1890) ("no one can be criminally punished in this country except according to a law prescribed . . . before the imputed offense was committed, or by some law passed afterwards, by which the punishment is not increased").

J., concurring) (Capital punishment imposed under the challenged statute was "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.").<sup>14</sup>

It is no answer for Vermont and others to assert that this is merely an exercise of jury discretion. See, e.g., *Pezzano v. Bonneau*, 133 Vt. 88, 90, 329 A.2d 659, 660. The authority that juries are exercising is not "discretion in the legal sense of that term, but . . . mere will. It is purely arbitrary and acknowledges neither guidance nor restraint." *Yick Wo v. Hopkins*, 118 U.S. at 366-67 (reviewing exercise of discretion in Fifth Amendment context).

[D]iscretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within bounds. Otherwise, . . . "[i]t is always unknown: It is different in different men: . . . In the best it is oftentimes caprice: In the worst it is every vice, folly, and passion, to which human nature is liable."

*McGautha v. California*, 402 U.S. 183, 285 (1971) (Brennan, Douglas & Marshall, JJ., dissenting).

<sup>14</sup> Problems with the standardless nature of punitive damages laws arise even in determinations of whether the requisite culpability has been established. Here, for example, the jury was told that punitive damages could be based on "extraordinary misconduct," "outrageous conduct," or "a willful and wanton or reckless disregard of the plaintiff's rights." C.A. 1180. None of those terms was defined. In *Giaccio*, the Court held "reprehensible," "improper," "outrageous to morality and justice," and "misconduct" impermissibly vague as tests for juries to employ in deciding whether to require an acquitted defendant to pay \$230.95 in court costs. 382 U.S. at 403. See also *Smith v. Wade*, 461 U.S. 30, 88 (1983) (Rehnquist & Powell, JJ., & Burger, C.J., dissenting) ("a vaguely defined, elastic standard like 'reckless indifference' gives free reign to the biases and prejudice of juries").



Nor is it prohibitively difficult for legislatures or courts to establish limits on, or objective standards for, punitive damages awards in order to ensure at least rough proportionality. Vermont, for example, has fixed maximum criminal fines for the entire panoply of criminal acts (*see, e.g.*, Appendix "C"); maximum civil penalties for a wide variety of civil misconduct (*see, e.g.*, Appendix "B"); and maximum punitive damages for still other civil misconduct (*see, e.g.*, Appendix "A"). Some of these fixed civil fines and punitive awards are for conduct that is similar in effect and culpability to antitrust conduct. *See, e.g.*, Vt. Stat. Ann. tit. 9, § 2461 (1984 & Supp. 1986) (treble damages for consumer fraud); Vt. Stat. Ann. tit. 5, § 1819 (1972 & Supp. 1986) (civil fines of specified sums for granting or consenting to special rebates). And, of course, Congress and dozens of state legislatures have established treble damages as the appropriate punitive damages for antitrust conduct such as the predatory pricing at issue in this case.

Nor has the application of these standardless laws, accompanied by an instruction that punitive damages are to punish and deter, generated a body of discernible, consistently applied common law guidelines. As the Court stated in another context:

All of the so-called court-created conditions and standards still leave to the jury such broad and unlimited power . . . that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is.

*Giaccio*, 382 U.S. at 403.

Predictably, this system has resulted not in consistent application of sound principles, but in identifiable discrimination against at least one group: corporate defendants. Researchers for the RAND Institute of Civil Justice concluded that "[c]orporate defendants are in fact more likely than individuals or public agents to be

the target of [punitive damages] awards" and that "[p]unitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings*, *supra* n. 10.

The excessiveness of punitive damages also results from unchanneled discretion exercised by juries in fixing the amount of the awards after the decision to impose punishment has been made. In various opinions in the last two decades, the Court has explicitly stated as much.<sup>15</sup>

Once again, neither proportionality nor any other cognizable standard is likely to be satisfied under these con-

<sup>15</sup> *See Gertz*, 418 U.S. at 350 (punitive damages laws leave juries "free to use their discretion selectively to punish expressions of unpopular views") (Powell, Marshall, Blackmun & Rehnquist, JJ.); *Foust*, 442 U.S. at 50 n.14 ("punitive damages may be employed to punish unpopular defendants") (Marshall, J., joined by Brennan, Stewart, White & Powell, JJ.); *Smith v. Wade*, 461 U.S. at 59 ("punitive damages are frequently based upon the caprice and prejudice of jurors") (Rehnquist, J., Burger, C.J. & Powell, J., dissenting); *cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) ("Because evidence of a tort-feasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award.") (Blackmun, J., joined by Burger, C.J., Stewart, White, Powell & Rehnquist, JJ.); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 74-75 (when punitive damages "bear no relationship to the actual harm caused, they then serve essentially as spring-boards to jury assessment, without reference to the primary legitimating compensatory function of the system, of an "infinitely wide range of penalties wholly unpredictable in amount. Further, I find it difficult to fathom why it may be necessary, in order to achieve its justifiable deterrence goals, for the State to permit punitive damages that bear no discernible relationship to the actual harm caused.") (Harlan, J., dissenting); *id.* at 84 ("This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others.") (Marshall, J., dissenting).

ditions. Because juries are not even told that the punishment they inflict should be proportionate to the wrongdoing involved, and because they are not told what punishments have been imposed for similar misconduct in other cases, any case-to-case consistency in the relationship between the severity of punishment and the gravity of wrongdoing must be purely fortuitous. Similarly, because juries are not given any guidance regarding the principles of deterrence or retribution, any relationship between those principles and the juries' awards must be wholly accidental.

Moreover, effective deterrence does not require such untrammelled discretion. Deterrence theory assumes that potential actors will rationally weigh the benefits and costs likely to flow from contemplated wrongful conduct. Rational deterrence obtains, therefore, only if the actors are informed about the magnitude of the costs, including punishments, they are likely to incur if they engage in the proscribed conduct. If laws fail to establish standards for punitive damages awards, actors contemplating wrongful conduct can only guess at the likely consequences of their misdeeds.

Rational deterrence also requires that punishment be imposed in the amount, and only in the amount, necessary to ensure that the actors' expected costs (i.e., actual costs adjusted upward to account for the probability that the conduct will not be detected and successfully prosecuted by injured persons and that punishment will not be imposed), will equal any gain that they would otherwise expect to obtain from the contemplated wrongful conduct. See H. Packer, *The Limits of the Criminal Sanction* 45-48 (1968); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 23-24, 43-53 (1982); Note, *Punitive Damages for Libel*, 98 Harv. L. Rev. 847, 849-51 (1985). Punishment in any other amount will either deter desirable activity or fail to deter undesirable activity.

Punitive awards imposed pursuant to standardless jury submissions also fail to serve the state's retributive pur-

poses. The basic test of the propriety of punishment as retribution is that the punishment must be proportionate to the wrongdoing. See Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 846 (1972). Punitive damages imposed pursuant to standardless jury submissions violate the proportionality requirement, as already shown above.

The \$6 million punitive award against Browning-Ferris in this case illustrates the vices of the standardless scheme. First, an award of that size was unpredictable. Browning-Ferris could not have known that its pricing activities could result in such an award. The highest reported prior punitive damages award under Vermont law, for any type of conduct of even the most heinous nature, had been only \$300,000, in *Greenmoss Builders, Inc. v. Dunn & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414 (1983), *aff'd*, 472 U.S. 749 (1985). See Appendix "E."

Similarly the \$6 million award was in the nature of an *ex post facto* increase in the punishment for Browning-Ferris' conduct. All prior conduct of the same or greater degree of culpability, or that had caused actual harm equal to or greater than that caused by Browning-Ferris, had resulted in punitive damages in markedly lower amounts, or in no punitive damages at all.

Further, and for the same reason, the \$6 million punitive award cannot be said to be proportionate to the gravity of Browning-Ferris' wrongdoing. It is improbable that, in the 200-year history of Vermont, no more heinous act had ever been committed and presented to a jury by a plaintiff seeking punitive damages. It is even more improbable that, as implied by the twenty-to-one ratio between the \$6 million award and the previous highest award of \$300,000, Browning-Ferris' pricing activities were approximately twenty times more heinous, harmful or difficult to deter than any previous act by any person or entity in Vermont history.



Finally, the \$6 million punitive damages award cannot be said to be justified by the injury inflicted by Browning-Ferris' misconduct, or the wrongful gain that the misconduct might reasonably have been expected to generate. The jury found that the injury was only \$51,146. And the only "gain" derived by Browning-Ferris was its loss of greater and greater amounts of business to Kelco, such that Browning-Ferris ultimately had to leave the market altogether. Even if a substantial adjustment were made to account for the possibility that Browning-Ferris' challenged pricing practices might have proved more successful, the sum required to deter such conduct would not approach \$6 million.

In sum, it is apparent that punitive damages are imposed in Vermont pursuant to laws that specify no limits, no required relationship to culpability, no required relationship to the punishments for other acts of wrongdoing, and no other objective standards for determining when and in what amount they are to be imposed. Punitive awards thus imposed serve no valid state interest.<sup>16</sup> Under these circumstances, the state's legislature, or its courts through common law development, should be required to "replac[e] arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing [punishment]." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).<sup>17</sup>

<sup>16</sup> As the Court previously has declared, "[s]tates have no substantial interest in securing for plaintiffs gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349.

<sup>17</sup> See generally *United States v. Evans*, 333 U.S. 483, 486 (1948) ("In our system, so far at least as concerns the federal process, defining crimes and fixing penalties are legislative, not judicial functions."); *United States v. Batchelder*, 442 U.S. at 125-26 (discussing "the Legislature's responsibility to fix criminal penalties"); *Gregg v. Georgia*, 428 U.S. at 174 n.19 (plurality opinion) ("legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values").

In particular, the state's legislature or courts should be required to establish objective standards to guide and limit juries in determining when, and in what amounts, punitive awards may be imposed. At a bare minimum, if the state's legislature and courts choose to continue to abdicate that responsibility, punitive awards under that state's laws should be subjected to heightened judicial scrutiny under the Eighth Amendment.

## II. A PUNITIVE DAMAGES AWARD THAT EXCEEDS EVERY LEGISLATIVELY ESTABLISHED MAXIMUM CRIMINAL FINE AND CIVIL FINE, INCLUDING LEGISLATIVELY ESTABLISHED PUNITIVE DAMAGES, FOR LIKE CONDUCT IN THE SAME AND OTHER STATES VIOLATES THE PROPORTIONALITY REQUIREMENT OF THE EXCESSIVE FINES CLAUSE

Even when a state has specified limits on the punishments permitted for various forms of wrongful conduct and has thereby provided objective guidelines regarding proportionality, a punishment *within* those limits may nevertheless violate the Excessive Fines Clause. *Solem*, 463 U.S. 277. In deciding whether such a violation exists,

a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

*Solem*, 463 U.S. at 292.

Although that holding was articulated in the context of a proportionality analysis of a legislatively fixed maximum prison sentence, the principle that Eighth Amendment proportionality analysis should be guided by objective criteria applies with equal force to other forms of punishment, including civil fines. See *Solem*, 463 U.S. at



289 ("Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments" (quoting *Ingraham*, 430 U.S. at 664)). If, as occurred here, the punishment has been imposed under a system with no specified limit or guideline, it can overcome its presumptive excessiveness only if its relationship to the available objective criteria can be demonstrated under a heightened Eighth Amendment scrutiny.<sup>18</sup>

The sources of relevant objective criteria are plentiful. To analyze the proportionality of a punitive damages

<sup>18</sup> The court of appeals below did not consider the *Solem* proportionality criteria or any related criteria. Instead, because the punitive award was less than one percent of the defendants' net worth, the court concluded that the award "was not inconsistent with punitive damages levied in other jurisdictions against large corporations" and "was not motivated by prejudice." 845 F.2d at 410.

There is neither a retributive nor deterrent rationale for the court of appeals' approach. If a defendant is to be punished, it should be punished for the gravity of the misdeed (as roughly indicated, for example, by the harm caused or threatened), not for the fact of being large. Especially where the misdeed is a purely economic one, such as pricing activity, the defendant's status has no legitimate retributive role.

Nor is a larger penalty necessary for deterrence. The size of the penalty needed for deterrence is determined by reference to the expected gain from the specific misconduct. Because it is often enough the case that the defendant's expected gain is equal to the plaintiff's expected loss (theft cases being one example), it makes sense to use compensatory damages as a rough measure of expected wrongful gain and, accordingly, as the basis for the appropriate punitive damages awards. But no such theory of deterrence makes the size of the penalty awarded for deterrence turn on the defendant's wealth. To the contrary, in most instances, a penalty that, together with compensatory damages and other costs, is sufficient to make the expected cost exceed the expected gain will deter the undesirable conduct. Cf. *Smith v. Wade*, 461 U.S. at 94 (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"). That will be true regardless of the actor's wealth; General Motors is no more likely than a small, specialty-car manufacturer to engage in misconduct whose expected cost exceeds the expected gain.

award for a particular misdeed, a court can look to (1) the criminal fines imposed in other instances in the same and other jurisdictions; (2) civil fines authorized for similar conduct in the same state and in other states; (3) civil fines in the nature of legislatively fixed punitive damages awards (whether fixed dollar sums, fixed multiples of compensatory damages, or sums fixed in some other manner, such as by reference to reasonable attorney's fees) for similar and dissimilar conduct in the same state and in other states; and (4) punitive damages awards imposed by juries, and upheld by courts applying meaningful standards, for similar and dissimilar conduct in the same state.

To determine whether the \$6 million punitive damages award in this case is excessive under the Eighth Amendment, the Court need not decide whether a punitive damages award that exceeds any one, or even two or three, of these objective standards is excessive. That is because the award in this case exceeds *all* of them. The five charts attached as Appendices "A" through "E" to this brief demonstrate that the punitive damages award of \$6 million greatly exceeds every objective indicium of proportionality provided by the Vermont legislature, by other Vermont juries that have awarded punitive damages, and by every other legislature in the United States (including Congress) that has specified permissible punitive damages or criminal fines for antitrust conduct such as predatory pricing.<sup>19</sup>

<sup>19</sup> Appendix "A" shows that the Vermont legislature has specified various forms of limits on punitive damages awards for a wide variety of wrongful conduct. The \$6 million punitive award here is more than 100 times larger than the compensatory damages; yet the largest multiple that the Vermont legislature has specified is a punitive award ten times the sum wrongfully obtained by the defendants, and the largest dollar sum specified is \$10,000.

Similarly, Appendix "B" shows that the Vermont legislature has specified a wide variety of civil fines for a wide variety of wrongful conduct ranging from various fraudulent actions to dan-

Thus, to declare the award excessive, the Court need conclude only that, at a bare minimum, when a state establishes no predetermined maximum punitive damages that may be awarded for a particular type of misconduct and allows a jury unguided discretion to award whatever sum they might choose to award, a sum of punitive damages awarded for that misconduct violates the Excessive Fines Clause if it exceeds (1) the maximum legislatively established criminal fine for conduct of the same or similar gravity, (2) the maximum legislatively established civil fine for conduct of the same or similar gravity, (3) the maximum legislatively fixed punitive damages awards for misconduct of the same or similar gravity; and (4) the maximum discretionary punitive damages award in a final judgment for conduct of the same or similar gravity in the same state.

In sum, the punitive damages judgment in this case vastly exceeds every legislatively established penalty,

gerous uses of radioactive material. The punitive award in this case is some 300 times larger than the largest civil fine for which a dollar maximum is specified.

Appendix "C" lists a wide variety of the legislatively established criminal fines in the State of Vermont. The punitive damages award in this case exceeds by millions of dollars, and by a multiple of more than 200, any specified fine for any nonviolent crime in the State of Vermont.

Appendix "D" shows that the punitive damages award in this case also vastly exceeds the legislatively specified maximum punitive damages for predatory pricing activity in every one of the forty-three states that specifies a measure of punitive damages for antitrust conduct. *See also* 15 U.S.C. § 15 (1982) (specifying treble damages and reasonable attorneys' fees as relief in antitrust actions).

Appendix "E" shows that the judgment also exceeded every reported prior punitive damages award, for every type of conduct, no matter how serious, how violent, or how harmful, in the history of the State of Vermont. *See, e.g., Greenmoss Builders, Inc.*, 143 Vt. 66, 461 A.2d 414 (punitive damages judgment of \$300,000 for libel).

civil or criminal, for any form of nonviolent wrongful conduct in the State of Vermont, and every legislatively established punitive damages award for the identical conduct—predatory pricing—in every state in the nation with a specified punitive damages award for that type of conduct. If the Excessive Fines Clause's prohibition of disproportionate fines is to have any significance, it must require reversal of that judgment.

### CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit affirming the district court's punitive damages judgment should be reversed.

Respectfully submitted,

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## APPENDICES



## APPENDIX A

LEGISLATIVELY SPECIFIED PUNITIVE DAMAGES  
FOR SPECIFIC FORMS OF CONDUCT IN VERMONT

Title and Section in Vermont Statutes Annotated	Description	Specified Punitive Damages
tit. 9, § 2311	Civil remedy for false checks	\$50, in addition to the amount of the check, court costs, bank fees, and attorney's fees
tit. 9, § 2361	Willful violation of motor vehicle financing laws	twice the total of finance charges under a contract made in willful violation of applicable provisions, in addition to reasonable attorney's fees, and the lender shall be barred from recovery of such charges
tit. 9, § 2409	Willful violation of retail installment sales laws	twice the total of the finance charges under a contract made in willful violation of the applicable provisions, in addition to reasonable attorney's fees, and the seller shall be barred from recovery of such charges
tit. 9, § 2461	Consumer fraud	exemplary damages not exceeding three times the value of the consideration given by the consumer
tit. 10, § 6242(c)	Illegal sale of mobile home park	greater of \$10,000 or 50% of gain realized in sale
tit. 10, § 6615(b)	Failure timely to comply with court order requiring removal of hazardous waste	three times the cost of removal
tit. 12, § 2152	Taking illegal costs or fees	ten times the excess

## APPENDIX B

## CIVIL FINES IN VERMONT

Title and Section in Vermont Statutes Annotated	Description	Civil Fine
tit. 1, § 618	Alteration of banks or bed of Connecticut river	"shall be fined" not more than \$5,000
tit. 2, § 255	Failure to register as a lobbyist	"shall be subject to a fine of" not more than \$500
tit. 3, § 809a	Failure to comply with subpoena issued by agency	not to exceed \$100
tit. 3, 2822(c) (4)	Violation of order of court under Environmental Conservation subsection	not less than \$100 and not more than \$10,000 for each violation
tit. 4, § 492	Willful failure by justice to deposit oath with town clerk	"may be fined" not more than \$100
tit. 4, § 958	Nonappearance of juror	"shall be fined" \$50
tit. 4, § 961	Willful misrepresentation on jury questionnaire	"may be fined" not more than \$50
tit. 5, § 65	Failure to pay tax to finance transportation board and agency of transportation	5% of tax not paid or \$10, whichever is greater, if tax is paid within 15 days after due; otherwise, 25% or \$50, whichever is greater; if fraudulent return is filed, 50% of amount due or \$20, whichever is greater
tit. 5, § 1819	Granting or knowingly consenting to special rebate or transportation rate	officer or employee: "shall be fined" not less than \$100 and not more than \$1,000 per company; not less than \$500 and not more than \$5,000

Title and Section in Vermont Statutes Annotated	Description	Civil Fine
tit. 5, § 2003	Transportation of radioactive materials	up to \$10,000 per day of violation
tit. 8, § 72(b)	Failure or refusal to produce documents or testify before banking and insurance commissioner	"may be fined" not more than \$1,000 per day of failure or refusal and six months suspension of authority to do business
tit. 8, § 558	Unlawfully doing business as or using names "bank," "banking association," "trust company"	"shall be fined" not more than \$500 per offense
tit. 8, § 1063	Violation of interstate banking rules	not less than \$1,000 nor more than \$10,000 per day
tit. 8, § 3662	Issuance of insurance policy following suspension of right to carry on insurance business	"shall be fined" not more than \$2,000 per policy
tit. 8, § 3368(c)	Transaction of insurance business without certificate of authority from commissioner	not less than \$50 nor more than \$1,000 per offense
tit. 8, § 3626	Advertising existence of insurance association for purpose of sale or solicitation of insurance	"shall be fined" not more than \$250 per offense
tit. 8, § 3661(2)	Violation of or non-compliance with insurance law requirements	"shall be fined" not more than \$2,000
tit. 8, § 3703	Discrimination in life insurance premiums charged, or related special favors or inducements	"may be fined" not more than \$500

Title and Section in Vermont Statutes Annotated	Description	Civil Fine
tit. 8, § 3861	Discrimination in fire and casualty insurance premiums charged, or related special favors or inducements	"shall be fined" not more than \$500
tit. 21, § 210	Labor safety	Up to \$20,000 for each employer who seriously or willfully violates, or for each employer who repeatedly violates, the Code or any rule, order, or regulation promulgated pursuant thereto
tit. 21, § 254	Fire safety and prevention	"shall be fined" up to \$1,000 for each violation, and not more than \$2,000 plus \$100/day for each failure to comply with any emergency order
tit. 8, § 4726	Unfair or deceptive insurance practices	"may be subject to a fine of" not more than \$500
tit. 9, § 2461	Injunction of prohibited acts of consumer fraud	not more than \$10,000 for each violation of the injunction
tit. 10, § 563(b)	Violation of confidentiality of air pollution records	"shall be fined" not more than \$100
tit. 10, § 555(c)	Violation of emissions reporting requirements	not more than \$100 per day
tit. 10, § 568	Violation of air pollution control laws generally	"shall be fined" not more than \$2,000
tit. 10, § 1025(a)	Violation of alteration of stream flow laws generally	"may be fined" not more than \$10,000 per day
tit. 10, § 6612(b)	Violation of laws governing hazardous waste management	not more than \$10,000 per day

Title and Section in Vermont Statutes Annotated	Description	Civil Fine
tit. 12, § 1623	Penalty for disobeying subpoena	not exceeding \$100 plus all costs of litigation incurred as a result of noncompliance
tit. 12, § 4916	Penalty when guilty of forcible entry or detainer	"fine" not exceeding \$10
tit. 14, § 105	Custodian or executor of will refuses to deliver or accept will or trust	\$10 for each month duty is neglected
tit. 18, § 130(6)	Violation of public health hazard provisions	not to exceed \$10,000 for each violation
tit. 32, § 7482(b)	Fraudulent failure to file tax return (estate and gift taxes)	\$25 for each month before proper return filed
tit. 32, § 7777(b)	Failure to pay assessment of tax deficiency by wholesale or retail dealer (cigarettes and tobacco products)	5% of assessment, for each month not paid in full, but not to exceed 25% of assessment
tit. 32, § 8147	Corporate officer makes false statement in tax return sworn to in another state (corporation taxes)	\$300
tit. 32, § 8910	Purchaser of motor vehicle willfully makes false statement on tax form furnished by commissioner (motor vehicle purchase and use tax)	not more than \$500



## APPENDIX C

## CRIMINAL FINES IN VERMONT

Title and Section in Vermont Statutes Annotated	Description	Fine
tit. 9, § 4238	Securities law violations	not more than \$10,000
tit. 9, § 4507	Discriminatory or unfair operation of public accommodations or housing practices	not more than \$1,000
tit. 10, § 1935(a)	Violation of laws governing underground storage tanks generally	not more than \$25,000
tit. 10, § 6612(a)	Violation of laws governing hazardous waste management	not more than \$25,000 per day
tit. 11, § 1031	Making of false statements by officers or directors concerning issuance of stock in business cooperative	not more than \$5,000
tit. 11, § 2204	Filing of false articles, statements, reports, etc. by directors and officers	not more than \$500
tit. 11, § 2754	Filing of false statements, articles, reports, etc. by directors and officers of non-profit corporation	not more than \$100
tit. 13, § 1101	Bribing public officers or employees	not more than \$5,000 if gift is less than \$500; not more than \$10,000 if gift is \$500 or more
tit. 13, § 1102	Public officers or employees accepting bribes	same as § 1101
tit. 13, § 1103	Bribing trier of causes	not more than \$1,000

Title and Section in Vermont Statutes Annotated	Description	Fine
tit. 13, § 1104	Trier of causes accepting bribes	not more than \$1,000
tit. 13, § 1105	Public Service Board members not to accept pay except from state	not more than \$1,000
tit. 13, § 1106	Demanding kickbacks for purchasing supplies	not more than \$5,000 if kickback is less than \$500; not more than \$10,000 if kickback is \$500 or more
tit. 13, § 1107	Demanding kickbacks for license	same as § 1106
tit. 13, § 1108	Demanding kickbacks as agent of private corporation	same as § 1106
tit. 13, § 1801	Forgery and counterfeiting documents	not more than \$1,000
tit. 13, § 1802	Uttering a forged instrument	not more than \$1,000
tit. 13, § 1804	Counterfeiting paper money	not more than \$1,000
tit. 13, § 1806	Affixing false signature to obligation of corporation	not more than \$1,000
tit. 13, § 2005	False advertising	not more than \$1,000
tit. 13, § 2006	False statement as to financial ability	not more than \$1,000
tit. 13, § 2022	Bad checks	not more than \$1,000, plus restitution of amount of check, and \$5 service fee
tit. 13, § 2531	Embezzlement generally	not more than \$500
tit. 13, § 2532	Embezzlement by officer or servant of incorporated bank	not more than \$1,000
tit. 13, § 2533	Embezzlement by receiver or trustee	not more than \$1,000

Title and Section in Vermont Statutes Annotated	Description	Fine
tit. 13, § 2534	Embezzlement by executor or administrator	not more than \$1,000
tit. 13, § 2535	Embezzlement by guardian	not more than \$1,000
tit. 13, § 2582	Theft of services	not more than \$1,000 if the value of the services is \$500 or less; not more than \$5,000 if the value of the services is more than \$500
tit. 13, § 2901	Perjury and subornation of perjury	not more than \$10,000
tit. 32, § 10010(a) and (b)	Willful evasion of tax	not more than \$10,000 or 5 times the amount of the tax defeated or evaded, whichever is larger
tit. 32, § 10105(a)	Willful failure to pay tax liability by generator	fine of not more than \$5,000

## APPENDIX D

## STATE ANTITRUST PRIVATE REMEDIES

STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
Alabama	Ala. Code § 6-5-60 (1977)	all actual damages plus \$500 in each instance of injury or damage
Alaska	Alaska Stat. § 45.50 576 (1986)	treble damages for willful violations, plus costs of the suit, including reasonable attorney's fees
Arizona	Ariz. Rev. Stat. Ann. § 44-1408 (1987)	up to three times the damages sustained, plus taxable costs and reasonable attorney's fees
California	Cal. Bus. & Prof. Code § 16750 (West Supp. 1988)	treble damages, interest from the date of service of the complaint, reasonable attorney's fees, and costs of suit
Colorado	Colo. Rev. Stat. § 6-2-111 (1973)	treble damages for unfair practices in violations of sections 6-2-103 to 6-2-108 or 6-2-110 (discriminatory sales, secret rebates, and sales below cost)
Connecticut	Conn. Gen. Stat. § 35-35 (1987)	treble damages, reason- able attorney's fees, and costs
Florida	Fla. Stat. § 542.22 (1988)	treble damages and costs of suit, including reasonable attorney's fees
Hawaii	Haw. Rev. Stat. § 480-13 (Supp. 1987)	treble damages or \$1,000, whichever is greater, and reason- able attorney's fees together with costs of suit

STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
Idaho	Idaho Code § 48-114 (1977)	treble damages and costs of suit, including reasonable attorney's fees
Illinois	Ill. Rev. Stat. ch. 38, para. 60-7 (1987)	treble damages for violations of subsections 3(1) or 3(4) of Anti-trust Act, Ill. Rev. Stat. ch. 38, para. 60-3, or, at the court's discretion, for willful violation of subsections 3(2) or 3(3), together with costs and reasonable attorney's fees
Indiana	Ind. Code § 24-1-2-7 (1982)	treble damages together with costs of suit, including reasonable attorney's fees
Iowa	Iowa Code § 553.12 (1987)	actual damages and reasonable attorney's fees, plus, at the court's discretion, exemplary damages that do not exceed twice the amount of actual damages
Kansas	Kan. Stat. Ann. § 50-801 (1983)	treble damages, plus reasonable attorney's fees and costs
Kentucky	Ky. Rev. Stat. Ann. § 365.070 (Michie/Bobbs-Merrill 1987)	treble damages (discriminatory sales, sales below cost, and unfair trade practices)
Louisiana	La. Rev. Stat. Ann. § 51:137	treble damages, costs of suit, and reasonable attorney's fees
Maine	Me. Rev. Stat. Ann. tit. 10, § 1104 (Supp. 1987)	treble damages, costs of suit, including necessary and reasonable investigative costs, reasonable experts' fees, and reasonable attorney's fees

STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
Maryland	Md. Com. Law Ann. § 11-209(b) (4) (1983)	treble damages, costs, and reasonable attorney's fees
Massachusetts	Mass. Gen. L. ch. 93, § 12 (1984)	up to three times the amount of actual damages caused by violations committed with malicious intent to injure, together with costs of suit, including reasonable attorney's fees
Michigan	Mich. Comp. Laws § 445.778 (Supp. 1988)	up to three times actual damages caused by a flagrant violation, plus interest on the damages from the date of the complaint, taxable costs, and reasonable attorney's fees
Minnesota	Minn. Stat. § 325D.57 (1986)	treble damages, together with costs and disbursements, including reasonable attorney's fees
Mississippi	Miss. Code Ann. § 75-21-9 (1972)	all damages, plus \$500 in each instance of injury
Missouri	Mo. Rev. Stat. § 416.121 (1979)	treble damages, reasonable attorney's fees, and costs of suit
Montana	Mont. Code Ann. § 30-14-222	treble damages
Nebraska	Neb. Rev. Stat. § 59-821 (1984)	actual damages or liquidated damages and costs of suit, including reasonable attorney's fees
Nevada	Nev. Rev. Stat. § 598A.210 (1987)	treble damages, reasonable attorney's fees, and costs
New Hampshire	N.H. Rev. Stat. Ann. § 356:11 (1984)	up to three times the actual damages, if the violation is willful or flagrant, plus costs of suit and reasonable attorney's fees



STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
New Jersey	N.J. Rev. Stat. § 56:9-12 (Supp. 1988)	treble damages, reasonable attorney's fees, filing fees, and reasonable costs of suit, including, but not limited to, the expenses of discovery and document reproduction
New Mexico	N.M. Stat. Ann. § 57-1-3 (1987)	up to three times actual damages, and costs and attorney's fees
New York	N.Y. Gen. Bus. Law § 340 (McKinney 1988)	treble damages, costs not exceeding \$10,000 and reasonable attorney's fees
North Carolina	N.C. Gen. Stat. §§ 75-16 and 75-16-1 (1987)	treble damages, and attorney's fees in selected instances
North Dakota	N.D. Cent. Code § 51-08.1-08	up to three times the damages sustained, if the violation is flagrant, taxable costs and attorney's fees
Ohio	Ohio Rev. Code Ann. § 1331.08 (Baldwin 1987)	double damages and costs of suit
Oklahoma	Okla. Stat. tit. 79, § 25 (1987)	treble damages, costs of suit, and reasonable attorney's fees
Oregon	Or. Rev. Stat. § 646.780 (1987)	treble damages and costs of suit, including necessary reasonable investigative costs and reasonable experts' fees, and reasonable attorney's fees at trial
Rhode Island	R.I. Gen. Laws § 6-36-11(a) (1956)	treble damages, reasonable costs of suit, including, but not limited to, the expenses of discovery and document reproduction, and reasonable attorney's fees

STATE	PRIVATE REMEDY	MEASURE OF DAMAGES
South Carolina	S.C. Code Ann. § 39-5-140 (Law. Co-op. 1985)	treble damages, reasonable attorney's fees and costs for willful or knowing use of unfair competitive methods
South Dakota	S.D. Codified Laws Ann. § 37-1-14.3 (1986)	treble damages, taxable costs, and reasonable attorney's fees
Texas	Tex. Bus. & Com. Code Ann. § 15.21 (Vernon 1987)	actual damages, plus interest from the date of service of the complaint, or treble damages, if the conduct was willful or flagrant, and costs of suit, including reasonable attorney's fees
Utah	Utah Code Ann. § 76-10-919(1) (Supp. 1987)	treble damages, costs of suit, and reasonable attorney's fees
Virginia	Va. Code Ann. § 59.1-9.12 (1987)	up to three times the actual damages, if the violation was willful or flagrant, costs of suit and reasonable attorney's fees
Washington	Wash. Rev. Code § 19.86.090	up to three times the actual damages, in the court's discretion, together with costs of suits including reasonable attorney's fees
West Virginia	W. Va. Code § 47-18-9 (1986)	treble damages, attorney's fees, and reasonable costs
Wisconsin	Wis. Stat. § 133.18 (Supp. 1988)	treble damages, costs of suit, and reasonable attorney's fees

## APPENDIX E

## VERMONT PUNITIVE DAMAGE CASES

Case	Award	Cause of Action
1. <i>Crabbe v. Veve Assoc.</i> , 549 A.2d 1045 (Vt. 1988)	\$30,000	land developer permanently obstructed easement
2. <i>Coty v. Ramsey Assoc.</i> , 546 A.2d 196 (Vt. 1988)	\$80,000 <sup>1</sup> \$150,000 \$150,000	nuisance
3. <i>Furno v. Pignona</i> , 522 A.2d 740 (Vt. 1986)	\$10,000	breach of contract and unlawful termination
4. <i>Poulin v. Ford Motor Co.</i> , 517 A.2d 1168 (Vt. 1986)	[\$40,000] <sup>2</sup>	violation of express and implied misrepresentation; violation of the Consumer Fraud Act
5. <i>Appropriate Technology Corp. v. Palma</i> , 508 A.2d 724 (Vt. 1986)	\$12,480	breach of contract and fraud
6. <i>Solomon v. Atlantis Dev. Inc.</i> , 516 A.2d 132 (Vt. 1986)	\$2,500	slander
7. <i>Murray v. J&amp;B Int'l Trucks, Inc.</i> , 508 A.2d 1351 (Vt. 1986)	\$5,000	conversion
8. <i>A.M. Varityper Div. of A.M. Int'l, Inc. v. Rabbo</i> , 505 A.2d 671 (Vt. 1986)	\$4,000	conversion

<sup>1</sup> Three awards for three plaintiffs.<sup>2</sup> Total award, punitives not separately stated.

Case	Award	Cause of Action
9. <i>Ball v. Barre Elec. Supply Co.</i> , 499 A.2d 787 (Vt. 1983)	unspecified	breach of contract; wrongful discharge
10. <i>Lent v. Huntoon</i> , 470 A.2d 1162 (Vt. 1983)	\$25,000	defamation
11. <i>Glidden v. Skinner</i> , 458 A.2d 1142 (Vt. 1983)	\$25,000	breach of contract
12. <i>Birkenhead v. Coombs</i> , 465 A.2d 244 (Vt. 1983)	\$750	intentional infliction of emotional distress
13. <i>Greenmoss Builders, Inc. v. Dun &amp; Bradstreet, Inc.</i> , 461 A.2d 414 (Vt. 1983) <i>aff'd</i> , 472 U.S. 749 (1985)	\$300,000	defamation
14. <i>Dean v. Arena</i> , 450 A.2d 1143 (Vt. 1982)	\$500	trespass
15. <i>Pezzano v. Bonneau</i> , 329 A.2d 659 (Vt. 1974)	\$7,500	conversion
16. <i>Dunbar v. Gabaree</i> , 330 A.2d 89 (Vt. 1974)	unspecified	assault and battery
17. <i>Allard v. Ford Motor Credit Co.</i> , 422 A.2d 940 (Vt. 1980)	\$1,000 (reversed)	conversion; wrongful repossession
18. <i>Gaylord v. Hoar</i> , 165 A.2d 258 (Vt. 1960)	\$200	conversion
19. <i>Parker v. Hoefer</i> , 100 A.2d 434 (Vt. 1953)	unspecified	alienation of affections and criminal conversion
20. <i>Gray v. Janicki</i> , 99 A.2d 707 (Vt. 1953)	\$500	tort for assault and battery

**AMICUS CURIAE**

**BRIEF**





No. 88-556

Supreme Court, U.S.  
**FILED**  
FEB 17 1989  
JOSEPH F. SPANOL, JR.  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

—  
BROWNING-FERRIS INDUSTRIES OF VERMONT,  
INCORPORATED and BROWNING-FERRIS INDUSTRIES,  
INCORPORATED,

*Appellant,*

v.

KELCO DISPOSAL, INCORPORATED, and JOSEPH KELLEY,  
*Appellees.*

—  
On Appeal from the Supreme Court of Vermont  
—

BRIEF OF  
INSURANCE CONSUMER ACTION NETWORK  
AS AMICI CURIAE IN SUPPORT OF APPELLEES  
—

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IN THE  
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OCTOBER TERM, 1988

No. 88-556

BROWNING-FERRIS INDUSTRIES OF VERMONT,  
INCORPORATED and BROWNING-FERRIS INDUSTRIES,  
INCORPORATED,

*Appellant,*

v.

KELCO DISPOSAL, INCORPORATED, and JOSEPH KELLEY,  
*Appellees.*

On Appeal from the Supreme Court of Vermont

**BRIEF OF  
INSURANCE CONSUMER ACTION NETWORK  
AS AMICI CURIAE IN SUPPORT OF APPELLEES**

**INTEREST OF AMICI CURIAE**

With the consent of the parties, the Insurance Consumer Action Network respectfully submits this brief as *amici curiae* in support of appellee. Copies of letters of both parties confirming this consent have been filed with this court.

The Insurance Consumer Action Network (ICAN) is a non-profit, non-partisan organization formed by California consumers to assist policyholders and claimants get

insurance claims paid, and to provide public education on claim filing, underwriting and premium setting. ICAN also represents consumers at the California legislature and with the Department of Insurance.

As is discussed in this brief, the insurance industry, free from federal regulation and subject to governmental control only by relatively weak state insurance departments, is only truly regulated by court action in individual tort claims, especially where such state court causes of action carry the threat of punitive damage awards to punish and deter corporate misconduct. Because appellant in the present case seeks to limit or eliminate punitive damages, the only truly effective weapon available to insurance consumers in their struggle for fair claims treatment, ICAN and those it represents have a direct and substantial interest in this case.

ICAN files this brief to bring to the Court's attention the crucial importance of punitive damages to insurance consumers across the country.

Amici are concerned that the position taken by appellants and amici counsel, in support of appellants, is another attempt to tamper with state tort law remedies which have been the only effective means of curbing oppressive insurance claims practices and deterring other commercial torts.

#### SUMMARY OF ARGUMENT

Punitive damages have developed as the most effective means by which the states can protect their citizens against corporate misconduct. They have been especially important in controlling the powerful and largely unregulated insurance industry. Punitive awards are the only effective manner of punishing and deterring wide spread claims abuses by the industry. Further, the cost of such regulation is borne not by society, but by the wrongdoers themselves. Punitive assessments provide the incentive

for individual victims and their attorneys to take on an opponent for whom they would otherwise be no match.

While the benefits to insurance consumers derived from punitive awards are great, evidence shows that the cost of such awards to the industry as a whole is minimal. Though the insurance industry has engaged in a massive public relations campaign to persuade the public, and now this Court, that punitive damage payments are out of control, the empirical evidence proves otherwise. Far from creating any sort of "crisis" in the insurance industry, such damage assessments by state courts are playing a crucial role in reforming long standing claims abuses.

#### ARGUMENT

##### **I. PUNITIVE DAMAGES HAVE DEVELOPED AT THE STATE LEVEL AS THE ONLY EFFECTIVE PROTECTION AGAINST FRAUD AND OPPRESSION BY CORPORATE WRONGDOERS.**

Governmental sanctions over the years have been notoriously inadequate in curbing corporate wrongdoing. This is no doubt due, in part, to a corporation's immunity from the threat of criminal prosecution's principal inherent weapons: loss of liberty and personal humiliation. In those rare cases where individual officers of corporations have been prosecuted, punishment has been woefully lax in comparison with the enormous amounts of money to be gained by wrongful activity. A study in *U.S. News and World Report* entitled "Corporate Crime—The Untold Story," September 6, 1982, at 25-28 states:

In comparison with the prison terms routinely dealt out to robbers and muggers, corporations and their executives, like other white-collar criminals, get off easy. Most offenses with which corporations are charged carry low fines that have not changed in years and, at worst, are minor irritants.

....

When Westinghouse Electric Company pleaded guilty in 1978 to charges involving bribery of an

Egyptian official, the maximum fine was \$300,000—one percent of the value of the 30-million-dollar contract it had obtained.

....

Even when convicted and punished, it is not unusual for an executive to be welcomed back into the company's hierarchy.

In the corporate world, as everywhere else, there are examples of good and bad. As stated by Robert Miles, Associate Professor of Business Administration at Harvard University, "some firms are 'real Neanderthals,' money-grubbing and ethically insensitive, while others are law-abiding and socially conscious." *Id.*

In certain areas, misconduct has been especially widespread:

In a few instances, almost entire industries have been caught breaking the law.

....

When a corporation gets into trouble, whether the charge is price fixing, bribery, kickbacks, tax evasion or pollution, the frequent explanation is: "Everybody does it." It is an idea that soothes the consciences of the culprits, and sometimes it is almost literally true. (*Id.*)

In such situations, where a corporate defendant has acted, and continues to act, in violation of the rights of a large group of people solely for the calculated purpose of making more money, punitive damage awards by state courts are the only effective remedy. In *Walker v. Sheldon*, 10 N.Y.2d 401, 179 N.E.2d 497, 233 N.Y.S.2d 488 (1961), the Court observed:

One who acts out of anger or hate, for instance, in committing assault or libel, is not likely to be deterred by the fear of punitive damages. On the other hand, those who deliberately and coolly engage in a far-flung fraudulent scheme, systematically conducted for profit, are very much more likely to pause

and consider the consequences if they have to pay more than the actual loss suffered by an individual plaintiff. An occasional award of compensatory damages against such parties would have little deterrent effect. A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.

*Id.*, 10 N.Y.2d at 406, 179 N.E.2d at 499, 233 N.Y.S.2d at 492. See also, *Boise Dodge v. Clark*, 92 Idaho 902, 453 P.2d 553 (1969).

Such awards are especially essential where compensatory damages are small in relation to the defendant's wealth and can be readily absorbed as a cost of doing business. Our state courts have recognized the importance of punitive damages under such circumstances. *Ward v. Taggart*, 51 C.2d 736, 336 P.2d 534 (1959), noted:

Courts award exemplary damages to discourage oppression, fraud, or malice by punishing the wrongdoer. (See McCormick, *Damages*, Sec. 279; Morris, *Punitive Damages in Tort Cases*, 44 HarvL.Rev. 1173, 1185-1188.) . . . Such damages are appropriate in cases like the present one, where restitution would have little or no deterrent effect, for wrongdoers would run no risk of liability to their victims beyond that of returning what they wrongfully obtained.

*Id.*, 51 C.2d at 743, n. 14-15.

As will be discussed in the following section, that is especially true in regard to the insurance industry.



## II. PUNITIVE DAMAGES UNDER STATE TORT LAWS ARE AN EFFECTIVE MEANS OF DETERRING CORPORATE MISCONDUCT AND THE ONLY REALISTIC PROTECTION FOR CONSUMERS FROM DISHONEST AND OPPRESSIVE INSURANCE PRACTICES.

The increase in punitive damage assessments against corporations can, in large measure, be attributed to the increase in insurance bad faith litigation.<sup>1</sup> From the reported case it is evident that fraudulent, malicious and oppressive conduct by insurance carriers runs rampant.

Sometimes the attitude of the companies is one of defiance and contempt when courts try to encourage fair and reasonable claim practices. In *Tibbs v. Great American Ins. Co.*, 755 F.2d 1370, 1376 (9th Cir. 1985), the company's response to the judge's advice to provide legal defense on a claim, was "F--- the Judge," and "no court of law is going to tell us what to do." Punitive damages can help remove an aura of arrogance and insolence that has permeated the industry.

The insurance industry has remained free of federal regulation through the McCarran-Ferguson Act, 15 U.S.C. Sections 1101-15, which effectively eliminated federal regulation by transferring responsibility to the states.<sup>2</sup>

<sup>1</sup> E.g.: A study of jury trials in San Francisco and Chicago concluded that an overall increase in the number and size of punitive damage awards between 1975 and 1985 was overwhelmingly accounted for by business and contract cases—most notably insurance bad faith cases. Rand Institute for Civil Justice, "Punitive Damages: Empirical Findings" (1987), reported in *Liability Week*, March 30, 1987.

<sup>2</sup> In *Paul v. Virginia*, 75 U.S. 168 (1868), this Court removed insurance from the field of federal regulation through the Commerce Clause, thereby leaving the matter to the state courts and state insurance commissioners. Ashley, *Bad Faith Actions*, Sec. 9:02, explains that thereafter:

The latter proved ineffective in controlling insurance abuses: the commissioners usually came from the ranks of the insurance

State insurance departments frequently have neither the willingness nor the ability to meaningfully regulate insurer conduct.<sup>3</sup> When insurance companies engage in misconduct, according to a study of state insurance regulation by the United States General Accounting Office in 1979, "the authority of departments to order corrective action is very limited." United States General Accounting Office, "Issues and Needed Improvements in State Regulation of the Insurance Business," at ii (1979). In addition, as the GAO rather delicately put it, "insurance regulation is not characterized by an arms-length relationship between the regulators and the regulated," with insurance commissioners typically coming from and returning to the industry. *Id.* at vii.

As noted by the Controller General's *Report to the Congress of the United States*, PAD 79-72, Oct. 9, 1979; an indepth study of the inability of state insurance de-

industry and, after short tours of duty, returned to the companies they had regulated.

In 1944, however, the Supreme Court issued its decision in *United States v. South-Eastern Underwriters Association*. . . . This decision sent shivers down the spines of insurance company executives, who feared the prospect of federal agencies, particularly the Federal Trade Commission, interfering with the insurers' cozy relationships with the state insurance commissioners.

The insurance industry devised an ingenious plan to head off federal regulation. It persuaded Congress to introduce legislation, known as the McCarran-Ferguson Act. . . .

<sup>3</sup> E.G.: At least 39 states have enacted some form of Unfair Claims Practices legislation, which, ironically, was originally lobbied for by the insurance industry to substitute for and forestall federal regulation. J. McCarthy, *Punitive Damages in Bad Faith Cases* (4th Ed. 1987), at vi. These statutes proscribe many of the same types of insurer conduct that have been the subject of common-law bad faith litigation, but the statutes only provide as sanctions relatively minor fines payable to the state and lack express provisions for private enforcement. *Id.*

partments to properly regulate the insurance industry, the insurance industry is simply too large for any state administrative agency to control. Similarly, an investigation entitled *N.B.C. Reports: "Protection for Sale; the Insurance Industry,"* dated April 17, 1982, revealed:

WE FOUND ALMOST EVERYWHERE WE WENT—STATE REGULATORS DOING AN INEFFECTIVE JOB. THE FEDERAL GOVERNMENT HAS SHOWN FOR DECADES THAT IT HAS LITTLE INTEREST IN GETTING INVOLVED. AND SO, CONSUMERS END UP HAVING TO TAKE ON THIS SPRAWLING INDUSTRY LARGELY BY THEMSELVES. IT IS NOT A FAIR MATCH. . . . (Capitalization in original.)

*Id.* at 74.

Because of the lack of effective oversight of insurance claim practices by government, punitive damages are the only real deterrent to malicious and oppressive conduct by insurance companies, just as they are the only meaningful punishment for such conduct. If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with virtual immunity. See *Walker v. Sheldon, supra*. Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173, 1185-88 (1931) (recommending punitive damages "where the risk of having to pay compensation probably would not discourage the commission of wrongs.")

Insurance practices as disclosed by reported cases can only be described as shocking in view of the fact that it is an industry affected with a public interest, an industry which promises that it will afford protection in a time of need. The courts have assessed punitive damages based on conduct which was dishonest, malicious and out-

rageous: *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490 733 P.2d 1073 (Ariz. 1987), *cert. denied*, 108 S.Ct. 212, *rev. denied*, 108 S.Ct. 477 (1987). [For over 18 years the company taught adjusters to cheat by "chiseling" small amounts on claims because policyholders would not perhaps object to these small year]; *Moore v. American United Life Ins. Co.*, 197 Cal.Rptr. 878, 150 Cal.App.3d 610 (1984). [Disability insurance benefits denied by use of misleading and deceptive settlement practices firmly grounded in an established company policy that had the potential of defrauding countless insureds other than plaintiff]; *Betts v. Allstate Ins. Co.*, 154 Cal.App.3d 688, 201 Cal.Rptr. 528 (1984). [A large judgment in excess of liability policy limits when "Allstate wilfully manipulated its own client," and "deliberately concealed adverse reports . . . from their own insured"]; *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1 (7th Cir. 1972). [Life insurer's practice was to not pay meritorious claims and to use "economic coercion" to "compromise" valid claims.] *Delos v. Farmers Ins. Group, Inc.*, 155 Cal.Rptr. 843, 93 Cal.App.3d 642 (1979) ["Nefarious scheme to mislead and defraud thousands of policyholders."]

In an early article recognizing the problem along with a practical solution, Professor Thomas F. Lambert, Jr., 35 ATLA L.J., at 224-226, stated:

Even if Calvin Coolidge was right that "the business of America is business," corporate enterprise does not have a free lance and must fight with the sword of the warrior and not the dagger of an assassin. The logic of the problem at hand is simple. A person who buys life, health and accident, disability or liability insurance is a consumer and deserves legal protection which is realistic. If the law does not vindicate his reasonable consumer's expectations until only years after battling well-heeled corporate entities and then only gives him policy proceeds (plus interest) from which he must deduct the contingent fee and gnawing expenses of litigation, then the in-

insurance industry has every illicit incentive in the world to fight the Bad Faith and nothing to lose (but policy proceeds plus interest). In this context, compensatory and contract damages don't really compensate. As shown by the modern cases and commentaries cited above, redress is readily at hand. Reparation plus admonition are urgently required, and the law must play professor to a recalcitrant industry by the imposition of deserved civil punishment via punitive damages.

Punitive damages help to give policyholders some semblance of protection. The importance of punitive damages is summarized in an article entitled, "Insurance Company Bad Faith Law—A Potent Weapon for Consumer Protection," by William M. Shernoff, *Trial*, May 1981, at 24, as follows:

[T]he imposition of punitive damages in a handful of bad faith cases in California has without a doubt generated a more thorough review by the insurance industry of its claims practices than was accomplished by ten years of legislative efforts to regulate insurance claims practices. . . .

Punitive damages have played an "increasingly significant role in protecting contemporary society from many non-regulated or inadequately regulated business and industries . . . ." Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613, 615 (1979).

These societal goals are being reached through the use of sanctions, the cost of which is being borne by the wrongdoer and not society. Professor Levine explains:

Comparing the regulatory function of punitive damage verdicts to the function of "regulatory" agencies reflects the effective simplicity of exemplary damages rules of law administered by judges and jurors and the ineffective complexity in the maize of administrative agencies and regulations. Paradoxically, from an

economic perspective, the cost of regulation through a punitive damage sanction is borne by the insurer acting wrongfully and not by taxpayers supporting an ineffective administrative agency.

Through punitive damage assessments, the corporate wrongdoer is forced to reward the consumer for his public service of bringing that wrongdoer to justice. *Bankers Life*, 483 So.2d at 269. The "reward" function of punitive damages is especially important in insurance cases where compensatory damages alone are not of sufficient magnitude to make it economically feasible for a lawyer to pursue the case, or for a plaintiff of modest means to pay expenses in connection with the case—particularly in view of the ability of insurers, with resources thousands of times greater than the plaintiff's, to simply wear him down during the course of litigation.

The public service performed by plaintiffs who bring insurance bad faith cases is enormous: they encourage insurance companies to deal more fairly with their policyholders. For example, in 1970 the California Court of Appeal upheld a punitive damage judgment against an insurer which had sought to induce a disabled policyholder into surrendering his policy by writing him false and threatening letters. *Fletcher v. Western National Ins. Co.*, 89 Cal.Rptr. 78 (App. 1970). Soon thereafter, two insurance company lawyers wrote an article advising insurers that *Fletcher* made it imperative for them to be cautious and fair in handling claims, since "any deviations from ethical business practices will subject them to harsh reprimands."<sup>4</sup> Similarly, a 1976 article in an insurance journal suggested nine steps, including making full disclosure to the insured and paying claims promptly, that insurers should take to avoid bad-faith punitive damage verdicts.<sup>5</sup> Dozens of other articles urging insur-

<sup>4</sup> Keenan and Gillespie, *The Insurer and the Tort of Intentional Infliction of Mental Distress*, 39 Ins. Couns. J. 335 (1972).

<sup>5</sup> Kornblum and Thornton, *The Seismic Impact of Punitive Damages in Actions Against Insurers*, 77 *Best's Rev.* 36 (1976).



ance companies to reform their claims practices have been written. They do not urge insurers to avoid dealing in bad-faith because it is immoral, but only because it subjects them to the possibility of large punitive damage judgments."

Without the availability of a punitive award, most insurance consumers simply could not afford the expense of bringing widespread claims abuses to the attention of the courts. As a result of punitive verdicts, insurers who were being inadequately regulated by administrative agencies are now being regulated and the conduct of the entire insurance industry is being reformed to conform to the reasonable interests and expectations of the public.

### III. PUNITIVE DAMAGE REMEDIES HAVE BEEN SPARINGLY APPLIED AND HAVE NOT CREATED ANY "CRISIS" AS CLAIMED BY THE INSURANCE INDUSTRY.

Because punitive awards further the purposes described above, their benefit to society is clear and substantial. Thus, even if the availability of such awards imposed substantial costs on insurers, the benefits of punitive damages would justify those costs. In fact, however, the evidence indicates that such awards have been applied sparingly and selectively, with minimal costs to the industry as a whole.

In February 1987, for example, the Texas State Board of Insurance analyzed 3,367 claims that had been closed in Texas between November 1983 and December 1986. The total paid out in those cases was \$487,703,243; the total paid out in punitive damages was \$100,000, or about 1/50 of 1% of the total. Texas State Board of Insurance, Texas Liability Insurance Closed Claim Study 89 (1987). Punitive damages were assessed in 6/10 of

<sup>6</sup> See generally Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613 (1979).

1% of general liability claims, and 2/10 of 1% of medical malpractice claims. *Id.* at 32.

Similarly, Aetna Insurance Company also conducted a study which concluded that the cost of punitive damages was minimal. In order to determine the effect on its claim costs of Florida's new "tort reform" law, which included limitations on punitive damages, Aetna analyzed 105 claims it had recently closed. In submitting the analysis, which demonstrated that the new law would have no effect, to the Florida Insurance Commissioner, Aetna explained that punitive damages had an impact on the claim settlement value in only 2 of the 105 cases. It estimated the total impact to be less than \$15,000—less than 1/10 of 1% of its total indemnity payments. Letter from Thomas L. Rudd, Superintendent, Insurance Department Affairs—Commercial Lines, to Charlie Gray, Chief, Bureau of Policy and Contract Review, Attachment entitled "Bodily Injury Claim Cost Impact of Florida Tort Law Change," Aug. 8, 1986.

A survey of jury verdicts from over 30 jurisdictions in 10 states by the American Bar Foundation confirms the Aetna and Texas findings. The Foundation found that the percentage of plaintiff's verdicts that included a punitive damage component ranged from 0% in four jurisdictions to a high of 21.6% in Cobb County, Georgia. The percentage for New York City, Cook County, and Los Angeles County—the three largest metropolitan areas in the nation—were 1.6%, 2.2%, and 8.6% respectively. American Bar Foundation, Preliminary Report of the Punitive Damages Project 10-11, Feb. 8, 1986.

Finally, the Rand Corporation's Institute for Civil Justice, which receives approximately half its funding from the insurance industry,<sup>7</sup> acknowledges that only about half the amount awarded as punitive damages is

<sup>7</sup> Rand Institute for Civil Justice, *Contributions History*, Sept. 7, 1984.

ultimately paid out, that punitive damage judgments are most frequent where defendants were found to have intentionally harmed plaintiffs, and that most punitive damage judgments are modest.<sup>8</sup>

In short, the benefit of punitive damages is enormous while the cost is minimal. While the insurance industry in recent years has launched a public relations campaign against the legal system in general and punitive damages in particular,<sup>9</sup> the empirical evidence demonstrates that the industry has been trying to "cry wolf."

<sup>8</sup> Rand Institute for Civil Justice, "Punitive Damages: Empirical Findings," (1987) reported in *Liability Week*, March 30, 1987 at 2.

<sup>9</sup> In December 1984, for example, the Insurance Information Institute (III), the industry's public relations arm, launched what it called an "effort to market the idea that there is something wrong with the civil justice system in the United States." *National Underwriter*, Dec. 21, 1984, at 2. Pursuant to that effort it sent a kit on the "civil justice crisis" to insurance executives and agents urging them to tell their policyholders and the media that "Insurers have no recourse but to cut back on liability insurance until improvements in the civil justice system will create a fairer distribution of liability, reduce the number of lawsuits and create a climate in which insurance can operate more predictably." Insurance Information Institute, "Outside for Speech: Crisis in the Civil Justice System," at 7, attachment to Memorandum from Mechlin D. Moore, President, Insurance Information Institute, to State Presidents and Senior Staff Executives of the Professional Insurance Agents, Nov. 11, 1985. Soon thereafter, the III announced a new \$6.5 million television and magazine advertising campaign designed, in the III's words, "to change the widely-held perception that there is an insurance crisis to a perception of a lawsuit crisis." *Journal of Commerce*, March 19, 1986, at 1, 20. The ads featured polio victims, mothers, ministers and high school athletes stating that "doctors are afraid to deliver babies, clergy are becoming reluctant to counsel their congregations, and high schools are thinking about closing down their sports programs" because of the "lawsuit crisis." *E.g.* Insurance Information Institute, "No One is Immune From the Lawsuit Crisis," *The Washington Post Magazine*, June 22, 1986. In 1987 Aetna was running similar ads. See, e.g., *The Wall Street*

A recent analysis of the so-called insurance "crisis" by a business publication states:

During the 1986 crisis, the industry embarked on a splashy public relations campaign proclaiming that the "insurance crisis" was really a "lawsuit crisis." Some three dozen states did make minor changes in the law. But the insurance crisis has abated without help from an overhaul of the nation's civil justice system.

Cool analysis is discrediting last year's horror stories about an epidemic of multimillion-dollar jury awards for relatively little cause. In a sample of 359 cases in the 1982-85 period, mostly involving product liability, *punitive damages were "insignificant."* according to a study published by the American Enterprise Institute. "*The civil litigation system is stable,*" says Mark Peterson of the Rand Institute for Civil Justice. Only in mass toxic tort cases, notably those involving asbestos, is potentially enormous cost a real concern. (Emphasis added.)

*Business Week*, May 25, 1987, Finance-Insurance at 123. The industry's alleged punitive damage "crisis" is no more legitimate than the industry's claims of financial distress.<sup>10</sup>

*Journal*, Jan. 23, 1987, at 21. Amicus Johnson & Higgins, "Insurance is Getting Killed in Self-Defense."

Ironically, now that "tort reforms" have been enacted in several states, the insurance industry has found that "the impact of the [tort] changes generally ranged from marginal to imperceptible." Insurance Services Office, Inc., Claim Evaluation Project, at 4 (1987). See also "No Florida Savings Seen from Tort Law Reform," *Journal of Commerce*, Oct. 2, 1986 at 1A.

<sup>10</sup> An investigation by the Government Accounting Office, Congress' investigative arm, found that the insurance industry was healthy and that insurers earned after tax profits of 19 Billion Dollars in 1986, when the insurance "crisis" was at its peak. "The industry's earnings improved from \$9.7 billion in 1985 to about \$19 billion in 1986." Statement of Wm. J. Anderson, Assistant Comptroller General, General Government Programs, U.S.G.A.O. before



Other studies, such as the Preliminary Report of the Punitive Damages Project by the American Bar Foundation in 1986 used a statistical analysis and found the following:

Perhaps what is most interesting . . . in light of the claims made about the incidence of punitive damage awards, is how low the percentage of punitive awards is in a number of sites. For instance, the percentage of reported verdicts in which the plaintiff wins money that include punitive awards is only 1.6% in New York City (all five counties making up New York City combined), 2.2% in Cook County, Illinois (which includes Chicago), and 8.6% in Los Angeles County, California. These three sites represent the three largest cities in the country, and they do not appear, generally speaking, to be facing a punitive damages storm. Punitive damages, in terms of their incidence, are unusual in these sites.

...

These tables reflect one particularly important consistency—punitive damages are not routine across all causes of action (this, of course, may be driven in part by differences in the law). The higher percentages of reported verdicts in the money that include a punitive award are clustered, typically, in a small set of causes of action: personal violence, fraud, false arrest, and insurance bad faith. . . .

....

[T]hese preliminary findings are sufficient to call into question many of the claims made in both professional circles and the mass media about punitive damages as well as the civil justice system generally. Punitive damages are not, in the sites we have studied at least, routine, nor are they necessarily awarded in amounts that boggle the mind. Relatively high percentages of verdicts with punitive

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the Subcommittee on Commerce, Consumer Protection and Competitiveness, House Comm. on Energy and Commerce, April 21, 1987, page 4.

damages appear in only a few sites, yet the median awards are relatively low in these sites. Punitive damages appear to be clustered in certain types of cases, ones that might be expected given the purposes of punitive damages. Extremely high dollar awards do not appear to be the norm, and they tend to appear in only a handful of causes of action which do not account for large proportions of the case load and in which plaintiffs are not as likely to win any money at all.

The insurance industry's concern over the number and size of punitive damage verdicts is misplaced. Given the state of the economy and particularly the healthy financial condition of the insurance industry, it would be expected that the amounts of such verdicts would increase each year. Every state has standards for assessment of punitive damages. One of the universal standards is that in determining the amount necessary to deter, the wealth of the defendant may be considered. Indeed, for punitive damages to fulfill the function of deterrence, it is necessary that such an assessment be considered in relation to the wealth of the defendant. "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." *Bertero v. National General Corp.*, 13 Cal.3d 43, 529 P.2d 608, 624 (1974).

An examination of the financial history of major insurance companies readily explains why the punitive damage trend would necessarily increase in amount if the deterrent purpose of such damages is to be accomplished. For example, one company which writes virtually every line of insurance, tripled its wealth over a ten-year period from 1.4 Billion to over 4 Billion Dollars. Its ten-year financial history is as follows:



## ALLSTATE INSURANCE COMPANY

Year	Net Worth "Surplus" (In Dollars)
1977	1,399,495,467
1978	1,693,533,517
1979	1,981,089,058
1980	2,371,135,879
1981	2,395,168,905
1982	2,822,168,434
1983	3,197,752,369
1984	3,229,029,379
1985	3,676,523,111
1986	4,081,689,528

Source: *Best Insurance Reports*, and the 1986 Allstate Annual Financial Statements filed with the Arizona Department of Insurance.

Using an insurer's present net worth of 4 Billion Dollars, a punitive damage assessment of \$1,000,000 for fraud or malice or intent to harm could hardly be considered excessive. The same ratio of punishment to a person with net worth of \$10,000 would be \$2.50; to a person with a net worth of \$100,000 would be a punitive assessment of \$25.00; and to a person or company with net worth of \$1,000,000, an equivalent punitive assessment would be \$250.00. Insurance companies or other wealthy wrongdoers cannot be given preferential and unequal treatment merely because they possess great wealth.

Increases in the number and amount of punitive damage verdicts would also be expected over the past 10 years because of the evolution of the law and the increased awareness and knowledge by the courts of commercial torts. Not only has there been heightened recognition that intentional and profitable civil misconduct should not be protected or condoned, but the civil justice system through reported decisions has educated the courts regarding dishonest business schemes which were not rec-

ognized 10 or 15 years ago. Each reported insurance bad faith case seems to uncover additional schemes used to cheat policyholders of the protection they had purchased.

An example is an unfair claims practice which was discovered seven years ago in a state which did not recognize insurance bad faith. The practice therefore went unpunished. *Hoffman v. Allstate Ins. Co.*, 85 Ill.App.3d 631, 407 N.E.2d 156 (1980). In *Hoffman*, the company used a "cleanup" deduction on a total loss auto collision claim to reduce pay-out, and got away with it, as explained in the case:

[O]ne of the defendant's adjusters, Jack Dooley, informed plaintiff that defendant deemed the car a total loss; he tendered and plaintiff accepted a check for \$116.37 in full payment of the loss pursuant to the collision coverage. . . . Dooley explained . . . this figure; included . . . deduction of \$55 which Dooley said was for "dealer preparation and shampoo," . . . . When plaintiff asked Dooley why such a deduction was made on a totally destroyed car, Dooley responded with words to the effect that "Allstate always does that." The check was returned uncashed to defendant on October 20, 1978. Plaintiff twice requested the location of the car for the purpose of having it appraised and apparently was never given this information.

*Id.* 407 N.E.2d at 157.

The Illinois Appellate Court, not recognizing insurance bad faith, affirmed the lower court dismissal of tort claims and punitive damages, and stated:

Count III sound in tort for fraud, alleging that defendant made "spurious" deductions from the retail value of the car and induced the plaintiff to accept the \$116.37 check by representing those deductions as being legitimate.

. . . .

[P]laintiff returned the \$116.37 check to defendant uncashed. Consequently, no apparent injury resulted

from any purported reliance on defendant's representations, and the dismissal of Count III was proper.

*Id.* 407 N.E.2d at 158.

Thus, the plaintiff was left with an ineffective remedy. With no punitive damages available to him on the claim which remained under Illinois law, there was no incentive for the insurer to change its practices. If an insurance company is held to no more than contractual damages for wrongful conduct in handling an insured's claim, while profiting by such misconduct, it has no incentive to change its illicit practices.

Several years later, the same practice, designed to cheat policyholders out of millions of dollars each year, was addressed in a state recognizing the tort of insurance bad faith and an appropriate punitive assessment was made for the purpose of deterring similar conduct in the future. *Hawkins v. Allstate Ins. Co., supra.*

In *Hawkins*, the evidence showed that the same company was still using its "cleanup" deduction on every total loss collision claim for the purpose of increasing its profits at the expense of its insureds. The *Hawkins* Court found "the deceptive practices were established company policy" for up to 18 years before the time of trial. The practices were exposed and hopefully deterred in *Hawkins* only because punitive damages were permissible with the advent of insurance bad faith as a tort in Arizona in 1981.<sup>11</sup>

Unfortunately, there will always be the company or individual who will seize upon the opportunity to turn a quick gain by imposing injury and deceit upon others. To those so disposed, punitive damages are the best response available. The availability of punitive damages

<sup>11</sup> *Noble v. National American Life Ins. Co.*, 128 Ariz. 188, 624 P.2d 866 (1981).

in civil litigation will continue to serve the purpose of forewarning other defendants that their energy and finances are more prudently spent improving their own standards and conduct, and operating within existing legal principles. Those who are called upon to account for their conduct will always be assured their day in court, in accordance with historically accepted standards of civil due process. The present standards and procedure reconcile a defendant's interest in incurring monetary judgments only when supported by the evidence, with society's interest in insuring that corporate wrongdoing is both rectified and deterred in the future.

### CONCLUSION

If the insurance consumer is to have any effective protection against corporate misconduct, the punitive damage remedy must be maintained and strengthened. Otherwise, he is defenseless against a \$400 Billion industry exempt from federal regulation and only ineffectively regulated by state governments.

The courts, and ultimately this Court, are the last best hope of the insurance consumer. As said over 100 years ago in *Goodard v. Grand Trunk Ry.*, 57 Me. 202 (1869): "If the courts will . . . let the doctrine of exemplary damages have its legitimate influence . . . great and growing evils will be very much lessened."

Respectfully submitted,

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February 1989

**AMICUS CURIAE**

**BRIEF**



FEB 17 1989

JOSEPH F. SPANIOL, JR.  
CLERK

No. 88-556

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., and  
BROWNING-FERRIS INDUSTRIES, INC.,  
*Petitioners*

vs.

KELCO DISPOSAL, INC., and JOSEPH KELLEY,  
*Respondents*

On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

Brief for California Trial Lawyers Association  
as Amicus Curiae Supporting Respondents

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No. 88-556

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

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BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., and  
BROWNING-FERRIS INDUSTRIES, INC.,  
*Petitioners*

VS.

KELCO DISPOSAL, INC., and JOSEPH KELLEY,  
*Respondents*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit**

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**Brief for California Trial Lawyers Association  
as Amicus Curiae Supporting Respondents**

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**INTEREST OF AMICUS CURIAE**

With the consent of the parties, the California Trial Lawyers Association respectfully submits this brief as amicus curiae in support of respondents. Pursuant to Supreme Court Rule 36.2, copies of the letters of the parties consenting to this brief have been filed with this Court.

The California Trial Lawyers Association ("CTLA"), founded in 1962, is a voluntary organization comprised of approximately 5,000 trial lawyers who appear regularly in state and federal courts. The predominant practice of most CTLA members is the representation of injured tort victims and victims of consumer fraud. The governing body of CTLA has authorized its participation in this case as amicus curiae.



CTLA is concerned that the positions taken by petitioners and amici in support of petitioners threaten to undermine or dilute one of the most effective deterrents to particularly reprehensible tortious conduct -- punitive damages. The constitutional theories espoused would have serious consequences for potential tort victims in California and every other state, and would seriously erode the states' abilities to curb despicable behavior within their borders. CTLA believes that a reinterpretation of the Eighth Amendment to cover civil punitive damages awards against corporations would harm victims of corporate abuse and violate fundamental tenets of our constitutional system.

### SUMMARY OF ARGUMENT

I. The Eighth Amendment safeguards basic human dignity by protecting individuals from inhumane treatment by the state and federal governments. It is a uniquely personal guarantee that was never intended and has never been applied to protect corporations or corporate dignity. As artificial creatures of state law, corporations are not afforded any of the guarantees of the Eighth Amendment.

II. Application of the Excessive Fines Clause to civil punitive damages awards would contravene basic principles of federalism by interfering with the states' traditional authority to fashion their own tort laws. The Eighth Amendment does not enact any particular economic theory of punitive damages, and individual states must be left free to implement their own economic and social policies through the development of different methods and standards for awarding and reviewing punitive damages awards.

III. Basic economic theory supports the consideration of a corporate defendant's wealth in assessing punitive damages. Corporate wealth is directly relevant to the deterrent purpose of punitive damages because shareholders of larger corporations are less fearful of corporate liability, decisionmakers in larger corporations are more insulated from corporate liability, larger corporations are better able to escape detection and liability for their tortious conduct, and larger awards are necessary to attract the attention of senior managers of large corporations engaged in a pattern of egregious misconduct. Corporate wealth is directly relevant to the retributive purpose of

punitive damages because larger corporations are better able to absorb monetary awards, tortious conduct by larger corporations is inherently more reprehensible and larger awards are necessary to punish the individuals responsible for the corporate misconduct.

### ARGUMENT

#### I.

#### THE EIGHTH AMENDMENT IS A PURELY PERSONAL GUARANTEE THAT DOES NOT APPLY TO CORPORATIONS

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636 (1819) (Marshall, C.J.). As an artificial creature of state law, a corporation is not entitled to the full panoply of constitutional rights of a natural citizen. The Eighth Amendment is one of those uniquely personal constitutional guarantees available only to individual persons. Far from giving corporations special protection from civil punitive damages awards, as petitioners would have it, the Eighth Amendment does not apply to corporations like petitioners at all.

It is well settled that corporations are not accorded all of the same constitutional rights granted to individuals. "Certain 'purely personal' guarantees . . . are unavailable to corporations because the 'historic function' of the particular guarantee has been limited to the protection of individuals." *First National Bank v. Bellotti*, 435 U.S. 765, 778 n.14 (1978). These "purely personal" guarantees include the privilege against self-incrimination, see *United States v. White*, 322 U.S. 694, 698-701 (1944), and the enjoyment of privacy, see *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 65-67 (1974); *United States v. Morton Salt Co.*, 338 U.S. 632, 651-52 (1950). "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." *First National Bank v. Bellotti*, 435 U.S. at 77 n.14.

The Eighth Amendment was derived from the English Bill of

Rights of 1689, which "was intended to curb the excesses of English judges under the reign of James II." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). Historians still debate the exact origin of the English provision, but there is no dispute that it was a reaction to punishments imposed upon individual English citizens in criminal cases. *See id.* Although the English version was principally directed against excessive punishments,<sup>1</sup> the "American draftsmen . . . were primarily concerned . . . with proscribing 'tortures' and other 'barbarous' methods of punishment." *Gregg v. Georgia*, 428 U.S. 153, 170 (1976).

Consistent with the history of the Eighth Amendment, this Court has specifically determined that it was designed for the protection of individuals. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958); *see also Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("fundamental respect for humanity underlying the Eighth Amendment"); *Gregg v. Georgia*, 428 U.S. at 182 ("basic concept of human dignity at the core of the Amendment"). The Eighth Amendment "was intended to safeguard individuals from the abuse of legislative power." *Gregg v. Georgia*, 428 U.S. at 174 n.19 (emphasis added).<sup>2</sup>

The Eighth Amendment has never in its 200-year history been

<sup>1</sup> See Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Cal. L. Rev. 839 (1969).

<sup>2</sup> The essential purpose of the Excessive Fines Clause is no different from the Cruel and Unusual Punishments Clause. Both were included in the English Bill of Rights and the United States Constitution at the same time. Blackstone discussed both in the same breath, *see* 4 Blackstone, *Commentaries on the Laws of England* 372-73 (1st ed. 1769), as did Patrick Henry, the Virginia delegate who objected to the absence of the Eighth Amendment prohibitions in the original Constitution, *see* 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 111 (2d ed. 1881). In both England and the United States, the two clauses were included with a third prohibiting excessive bail (which by its very nature can only apply to natural persons). This Court has held that the three clauses of the Eighth Amendment simply provide "parallel limitations" on

applied to safeguard the "dignity" of corporations. Nor has it ever been held to protect corporations from the legislative power which creates them and permits them to function. Over the last two centuries, the Eighth Amendment has been confined to the protection of individuals against abusive and inhumane exercises of power by the states. Its guarantee of humane punishment for crime is inherently a personal one which may be invoked only by natural individuals, not by fictional "entities whose very existence and attributes are a product of state law." *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 107 S.Ct. 1637, 1649 (1987).

The inherently personal function of the Eighth Amendment is akin to that of the Fifth Amendment privilege against compulsory self-incrimination, which this Court has held inapplicable to corporations. *See United States v. White*, 322 U.S. at 698. The Eighth Amendment, like the Fifth, "grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials . . . upon a plane of dignity, humanity, and impartiality." *Id.* The Eighth Amendment also has as its objective the avoidance of "[p]hysical torture and other less violent but equally reprehensible" conduct. *Cf. id.* Thus, the guarantee of the Eighth Amendment, like the privilege against self-incrimination, "is essentially a personal one, applying only to natural individuals. . . . [I]t cannot be utilized by or on behalf of any organization, such as a corporation." *Id.*

For the first time in 200 years, petitioners urge this Court to apply the Eighth Amendment to civil tort awards against corporations. They acknowledge the lack of precedent for extending the Eighth Amendment to civil suits, but completely ignore the fact that their corporate status stands as an insurmountable impediment to the assertion of any Eighth Amendment claim. Amicus Navistar International Transportation Corporation ("Navistar International") also bypasses this key issue, going so far as to argue that corporations

three different kinds of criminal sanctions -- bail, fines, and punishment. *See Ingraham v. Wright*, 430 U.S. at 664. In fact, the Cruel and Unusual Punishments Clause prohibits for non-monetary punishments exactly what the Excessive Fines Clause prohibits for fines: "punishment grossly disproportionate to the severity of the crime . . ." *Id.* at 667 (citing *Weems v. United States*, 217 U.S. 349 (1910)).



should be accorded special treatment under the Eighth Amendment by having their wealth deemed a constitutionally impermissible consideration for punitive damages. (Amicus Brief at 9-28.)

The Eighth Amendment was never intended and has never been applied to protect corporations. It is a personal guarantee that safeguards human dignity and ensures humane treatment of individuals. Even if this Court were prepared to extend the Eighth Amendment to civil punitive damages awards, it does not apply to protect the corporate entities in this case. There is no legal basis for "wrenching the Eighth Amendment from its historical context" by extending its protections to artificial creatures of state law. See *Ingraham v. Wright*, 430 U.S. at 669.

## II.

### BASIC PRINCIPLES OF FEDERALISM PRECLUDE FEDERAL INTRUSION INTO THE STATES' TRADITIONAL AUTHORITY TO FASHION THEIR OWN RULES OF TORT LAW

The Eighth Amendment stands as a bulwark against inhumane treatment of individuals by the government, falling squarely within the historic role of the Bill of Rights to protect individuals against abusive state action. Petitioners would now reinterpret the function of the Eighth Amendment to protect corporations from paying substantial punitive damages awards to individual victims of egregiously tortious misconduct. Petitioners' theory, if adopted by this Court, would spawn a federal jurisprudence of excessive damages at least as intrusive to state autonomy as the outdated jurisprudence of *Lochner v. New York*, 198 U.S. 45 (1905). It would enshrine into the Eighth Amendment a rigid constitutional standard of excessive punitive damages contrary to the most elemental principles of federalism.

This Court has long recognized that a state has a strong interest "in fashioning its own rules of tort law . . ." *Martinez v. California*, 444 U.S. 277, 282 (1980). Under our system of federalism, federal courts have given "long-standing acceptance [to] the notion that tort law, much like the law of domestic relations, belongs almost exclusively

to the states." *In re Asbestos Litigation*, 829 F.2d 1233, 1243 (3d Cir. 1987), cert. denied sub nom. *Owens-Illinois, Inc. v. Danfield*, 108 S. Ct. 1586 (1988). "[E]nsuring the availability of compensation for injured plaintiffs is predominately a matter of state concern and, in the absence of congressional enactments, state law, both as to the extent of compensation available and punitive damages, must apply." *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1325 (5th Cir. 1985).

The availability and amount of punitive damages awards is an integral part of the states' "traditional authority to provide tort remedies to their citizens . . ." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). "Punitive damages have long been a part of traditional state tort law." *Id.* at 255. In several different contexts, this Court has affirmed punitive damages awards under state tort laws even in areas heavily regulated by federal statutes. See *id.* at 255-58; *International Union v. Russell*, 356 U.S. 634, 640-46 (1958); *United Construction Workers v. Laburnum*, 347 U.S. 656, 658-69 (1954).

Petitioners' novel theory of the Eighth Amendment would seriously impinge upon the states' traditional authority to fashion their own tort laws and develop their own standards for awarding and reviewing punitive damages. Despite the fact that state courts already review punitive damages awards for excessiveness,<sup>3</sup> petitioners would have this Court displace the state standards of review and superimpose a rigid federal constitutional standard. This Court has repeatedly warned of the "constitutional shoals" that would confront any attempt to transform the federal Constitution into a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 645, 701 (1976) (citing *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971)).

Since the discredited era of *Lochner v. New York*, 198 U.S. 45

<sup>3</sup> See, e.g., *Rooks v. Brunch*, 202 Kan. 441, 449 P.2d 580, 583-84 (1969); *Loeb v. Teitelbaum*, 77 A.D.2d 92, 432 N.Y.S.2d 487, 496-97 (1980); *Keefe v. Gimbel's*, 124 Misc.2d 658, 478 N.Y.S.2d 745, 750-51 (1984); *Hall v. Consolidated Edison Corp.*, 104 Misc.2d 565, 428 N.Y.S.2d 837, 842-43 (1980); *Swartz v. Steele*, 42 Ohio App. 2d 1, 325 N.E.2d 910, 914 (1974).



(1905), this Court has also consistently reaffirmed its commitment to the principle that the "Constitution does not require the States to subscribe to any particular economic theory." *CTS Corp. v. Dynamics Corp.*, 107 S.Ct. at 1651. Petitioners and amicus Navistar International now seek to revive a jurisprudence reminiscent of *Lochner* by having the federal courts substitute their own economic judgment for that of the states in determining what is an excessive punitive damages award. However, the Constitution "does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. at 75 (Holmes, J., dissenting). Nor does it enact the Chicago law and economics theories of excessive punitive damages. (See Navistar International Amicus Brief at 9-28.)

State legislatures and courts must be left free to fashion their own economic theories of tort law, and to determine for themselves what amount of punitive damages will effectively serve deterrent and retributive objectives. This Court has recognized that individual states serve as laboratories for the development of social, economic, and political ideas. See *Chandler v. Florida*, 449 U.S. 560, 579 (1981); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). States must be permitted to experiment with their own methods for the deterrence of illegal or egregious misconduct even if their methods are based upon "unprovable assumptions." See *Whalen v. Roe*, 429 U.S. 589, 597 & n.20 (1977) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61, 63 (1973)).<sup>4</sup>

The development of different states' punitive damages laws over time perfectly exemplifies the process of experimentation with social, economic, and political ideas. "[T]here was significant variation (both terminological and substantive) among American jurisdictions in the late 19th century on the precise standard to be applied in

<sup>4</sup> The traditional standards for the award of punitive damages are in fact based upon sound economic theory, for the reasons described in section III below. Whether based on sound economic theory or unprovable assumptions, however, the state standards should not be displaced by an inflexible federal rule that removes from state legislatures and courts the ability to evolve their own punitive damages laws in response to developing economic conditions and ideals.

awarding punitive damages . . . ." *Smith v. Wade*, 461 U.S. 30, 39 (1983). Despite the initial differences, most jurisdictions have now "adopted more or less the same rule, recognizing that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence." *Id.* at 48-49.

Yet state punitive damages laws continue to evolve and progress in response to the problems and needs perceived by the individual states. The flexibility of the states to develop and change their tort laws has been reflected not only in the basic rules for awarding punitive damages, but also in the burdens of proof and the standards of review. In recent years, there has been a trend in some states to raise the level of reprehensible conduct required to award punitive damages. For example, although this Court recognized the propriety of a "recklessness" standard for punitive damages in *Smith v. Wade*, *supra*, Arizona has "restrict[ed] its availability to those cases in which the defendant's wrongful conduct was guided by evil motives." *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565, 578 (1986). The requisite "evil mind" may be shown only if the defendant intended to injure the victim or "consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others." *Id.*

Some state courts have also required plaintiffs to meet the highest burden of proof applicable in civil cases before being awarded punitive damages. Arizona and Wisconsin are both examples of states which have prospectively changed their laws to require that plaintiffs prove entitlement to punitive damages by "clear and convincing evidence." See *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 733 P.2d 1073, 1086-88 (Ariz. 1987), *cert. denied*, 108 S. Ct. 212 (1987); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 680-81 (1986); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437, 458 (1980). Other states have also acted to restrict the permissible monetary range of punitive damages awards by statute. See, e.g., Colo. Rev. Stat. § 13-21-102 (Bradford Supp. 1986); Conn. Gen Stat. Ann. § 52-2406 (West Supp. 1988); Va. Code Ann. § 8.01-38.1 (1988 Supp.).

The California experience with punitive damages best illustrates the progressive refinement and restriction of punitive damages laws

by the state legislature and judiciary. Unlike Vermont, California has had a statute permitting the award of punitive damages for oppression, fraud, or malice since 1872. See Cal. Civil Code § 3294 (West 1970). In the last decade, the statute has been amended by the California Legislature five times.<sup>5</sup> The 1980 amendment added specific definitions of the terms "oppression," "fraud," and "malice." See Cal. Civil Code §§ 3294(c)(1)-(3) (West Supp. 1989). The 1983 amendment expanded the ability of survivors of homicide victims to obtain punitive damages. See *id.* § 3294(d). The 1987 amendment added a "clear and convincing evidence" requirement and narrowed the definitions of "malice" and "oppression" to require at least "despicable" conduct. See *id.* §§ 3294(c)(1)-(2).<sup>6</sup>

California courts, like other state courts, have over time adopted specific legal standards for judicial review of punitive damages awards. The trial court must review the award in the first instance. "In ruling on a motion for new trial for excessive [punitive] damages, the trial court does not sit 'in an appellate capacity but as an independent trier of fact.'" *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 823, 174 Cal.Rptr. 348 (1981) (quoting *Neal v. Farmers Ins. Exchange*, 21 Cal.3d 910, 933, 148 Cal.Rptr. 389, 582 P.2d 980 (1978)). The trial court may therefore substitute its own "independent

<sup>5</sup> See 1988 Cal. Stat. ch. 160, § 17; 1987 Cal. Stat. ch. 1498, § 5; 1983 Cal. Stat. ch. 408, § 1; 1982 Cal. Stat. ch. 174, § 1; 1980 Cal. Stat. ch. 1242, § 1.

<sup>6</sup> Based upon these statutory provisions, the Committee on Standard Jury Instructions of the Superior Court of Los Angeles County has adopted a specific standardized jury instruction for the award of punitive damages in California. See *California Jury Instructions Civil - Book of Approved Jury Instructions* (BAJI) 36-39 (West Supp. 1988). The BAJI instruction defines "despicable conduct" as conduct so "vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people." *Id.* at 36 (brackets omitted). In addition to stating the general standards set forth in the statute, the BAJI instruction provides that in arriving at an amount of punitive damages the jury must consider the "reprehensibility of the conduct of the defendant" and the "amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition." *Id.* at 37.

judgment" in determining whether the punitive damages award is "fair and reasonable" on the evidence presented. See *id.* at 823 (citing Cal. Code Civ. P. § 662.5(b)).

Judicial review of punitive damages awards does not end with the trial judge's independent exercise of judgment. Under California law, a reviewing court must reverse those punitive damages awards "which the entire record, when viewed most favorably to the judgment, indicates were rendered as a result of passion and prejudice." *Bertero v. National General Corp.*, 13 Cal.3d 43, 65 n.12, 118 Cal.Rptr. 184, 529 P.2d 608 (1974). California appellate courts have found punitive damages awards to be excessive under this standard in a number of cases. See, e.g., *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 823-24, 157 Cal.Rptr. 482, 598 P.2d 452; *Burnett v. National Enquirer*, 144 Cal.App.3d 991, 1011-12, 193 Cal.Rptr. 206 (1983), appeal dismissed, 465 U.S. 1014 (1984); *Little v. Stuyvesant Life Ins. Co.*, 67 Cal.App.3d 451, 469-70, 136 Cal.Rptr. 653 (1977); *Zhadan v. Downtown L.A. Motors*, 66 Cal.App.3d 481, 494-501, 136 Cal.Rptr. 132 (1976); *Merlo v. Standard Life & Acc. Ins. Co.*, 59 Cal.App.3d 5, 18, 130 Cal.Rptr. 416 (1976).<sup>7</sup>

<sup>7</sup> California courts have specifically rejected the idea that there is some "fixed ratio by which to determine the proper proportion" of punitive damages to compensatory damages. See *Finney v. Lockhart*, 35 Cal.2d 161, 164, 217 P.2d 19 (1950). Courts have approved ratios of 2000 to 1, see *id.* at 163-65, 190.5 to 1, see *Wetherbee v. United Ins. Co. of America*, 18 Cal.App.3d 266, 270-72, 95 Cal.Rptr. 678 (1971), and 74 to 1, see *Neal v. Farmers Ins. Exchange*, 21 Cal.3d at 927-29. At the same time, the courts have reversed ratios of 476.2 to 1, see *Wetherbee v. United Ins. Co. of America*, 265 Cal.App.2d 921, 932-34, 71 Cal.Rptr. 764 (1968), and 3 to 1, see *Burnett v. National Enquirer, Inc.*, 144 Cal.App.3d at 1011-12. See generally *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 393-96, 202 Cal.Rptr. 204 (1984); Levine, *Demonstrating the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613, 633 (1979); Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1181 (1931). Comparison of a particular punitive damages award with the amounts awarded in other cases is not a valid consideration under California law, and the mere fact that an award may set a precedent by its size does not in itself render the award suspect. See *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d at 818-19.



Petitioners' theories would deprive California and all other states of their historic flexibility to fashion punitive damages laws and standards of review for excessiveness according to their own political, economic, and social theories. They would straitjacket the states into a narrow economic theory of punitive damages, stripping away the ability of state legislatures and state courts to determine for themselves the rules for punitive damages awards. There is no conceivable rationale for this unprecedented intrusion into the traditional domain of the states. The states' "interest[s] in fashioning [their] own rules of tort law [are] paramount to any discernible federal interest . . ." *Martinez v. State of California*, 444 U.S. 277, 282 (1980).

It is well settled that federalism concerns must "guide" this Court's decisions on issues of constitutional law. See *Chandler v. Florida*, 449 U.S. 560, 580 (1981). A "healthy regard for federalism and good government" is at the very root of our constitutional system. See *Reeves, Inc. v. Stakes*, 447 U.S. 429, 441 (1980). Nowhere has this Court's deep respect for principles of federalism been more pronounced than in its decisions under the Eighth Amendment. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court considered the constitutionality of capital punishment under the Cruel and Unusual Punishments Clause. What the Court declared about the deterrent and retributive value of capital punishment applies with even greater force to punitive damages:

The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. . . .

[W]e cannot say that the judgment of the Georgia legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment is not without

justification and thus is not unconstitutionally severe.

*Id.* at 186-87.

The evaluation of punitive damages as a deterrent and a sanction, and particularly the factors relevant to the achievement of deterrence and retribution, are matters even more exclusively the domain of the states than the social utility of capital punishment. If considerations of federalism require deference to the states "on a matter so grave as the determination of whether a human life should be taken or spared," *id.* at 189, then deference to the state legislatures and courts is surely warranted in their assessment of punitive damages awards. It is difficult to conceive of a field more appropriately left to the wisdom and judgment of the individual states implementing their own political, economic, and social policies.

Exactly a century ago, this Court declared that the "propriety and legality" of punitive damages had already "been recognized . . . by repeated judicial decisions for more than a century." *Minneapolis & St. Louis Railway Co. v. Beckwith*, 129 U.S. 26, 36 (1889). Now, after two centuries during which state legislatures and courts have been accorded the freedom and the respect to develop their own punitive damages laws, petitioners would have the federal courts intervene by reinterpreting the Eighth Amendment to impose unprecedented restrictions upon punitive damages awards. This result would contravene basic principles of federalism and work an unwarranted interference with "the freedom of the States to fashion their own laws of torts in their own way under no threat of federal intervention . . ." *Monroe v. Pape*, 365 U.S. 167, 245 (1961) (Frankfurter, J., dissenting).

### III.

#### ECONOMIC THEORY SUPPORTS CONSIDERATION OF A CORPORATE DEFENDANT'S WEALTH IN ASSESSING PUNITIVE DAMAGES

The consideration of a defendant's financial status in assessing fines and punitive damages is at least as old as Blackstone's 1769 discussion of the Excessive Fines Clause of the 1689 English Bill of Rights:



The quantum, in particular, of pecuniary fines neither can, nor ought to be, ascertained by an invariable law. The value of money itself changes from a thousand causes; and in all events *what is ruin to one man's fortune, may be a matter of indifference to another's.*

4 Blackstone, *Commentaries on the Laws of England* 372-73 (1st ed. 1769) (emphasis added).

This Court has also acknowledged the relevance of a defendant's wealth in setting fines and punitive damages awards:

[I]n fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, [a court must] consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant.

*United States v. United Mine Workers*, 330 U.S. 258, 304 (1947); see also *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 270 (1981) (noting that "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded").<sup>8</sup>

Yet amicus Navistar International argues that, as a matter of economic theory, corporate defendants must be treated differently from individual defendants. (Amicus Brief at 9-28.) Navistar International advocates that corporations, unlike individuals, must be constitutionally exempt from consideration of their financial resources in the assessment of fines and punitive damages. The fundamental flaw with this argument, as described above, is that it requires this Court to substitute Navistar International's economic theories for those of the individual states. In addition, for the reasons set forth below, the

<sup>8</sup> The law review literature is also supportive of considering net worth in assessing punitive damages. See, e.g., Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 668 (1980); Owen, *Punitive Damages in Products Liability Litigation*, 74 Michigan L. Rev. 1257, 1318-19 & n.295 (1976); Comment, *Punitive Damages: An Appeal for Deterrence*, 61 Nebraska Law Review 651, 660-61 (1982).

argument is based upon faulty economic reasoning.<sup>9</sup>

### A. Corporate Wealth Must Be Taken Into Account To Achieve the Deterrent Purpose of Punitive Damages

"[D]eterrence of future egregious conduct is a primary purpose of . . . punitive damages." *Smith v. Wade*, 461 U.S. 30, 49 (1983). Navistar International argues that it is "a mistake of economic logic to suppose that taking into account the net worth or revenues of a defendant like BFI serves deterrent purposes." (Amicus Brief at 10.) In fact, it is Navistar International's own theory that is based upon mistaken economic logic. A corporation's net worth is directly relevant to the deterrent purpose of punitive damages awards for several reasons.

#### 1. Corporate Wealth is Related to Shareholders' Attitudes Towards Corporate Liability

A corporation's net worth is relevant to the objective of deterring egregious conduct because the shareholders of larger corporations are generally less fearful of corporate liability than the shareholders of smaller corporations. It follows that in order to achieve deterrence by affecting shareholder motivation to avoid liability, higher liability must be imposed on larger corporations.

In general, two factors govern the fear of liability on the part of a shareholder. First, shareholders are more likely to fear a given level of corporate liability the more they have at stake in a corporation.<sup>10</sup> If

<sup>9</sup> Navistar International's claim that the court of appeals rested its decision "solely" on petitioners' financial status is clearly wrong. In affirming the punitive damages award, the court of appeals specifically referred to the "evidence that defendants willfully and deliberately attempted to drive Kelco out of the market . . . ." *Kelco Disposal, Inc. v. Browning-Ferris Industries*, 845 F.2d 404, 410 (2d Cir. 1988). Thus, the decision was plainly based upon the reprehensibility of petitioners' conduct as well as their financial status.

<sup>10</sup> Portfolio theory holds that the optimal portfolio for an investor will be diversified across the securities of many firms in order to avoid too much

a shareholder has all of his or her wealth invested in a corporation, and the corporation's liability for tortious conduct results in a substantial reduction of its share prices, the shareholder will suffer a severe financial setback. If, on the other hand, the shareholder has a very small percentage of his or her holdings in a corporation, then even if corporate liability substantially reduces the corporation's profits and share prices, the shareholder will not experience any noticeable financial consequences.

The second factor affecting a shareholders' fear of liability is the impact a given amount of corporate liability will have on the profits and share price of the corporation's stock. If a \$6 million liability payment will result in a substantial reduction in corporate profits and share prices, shareholders will be considerably more fearful of the risk of liability than if the corporation can easily absorb the liability without a significant reduction in profits and share prices.

Each of these factors is directly related to a corporation's size and assets. The larger a corporation, the more likely is its stock to be traded on major stock exchanges and to be held by many different individuals whose assets are widely diversified. This common sense conclusion is supported by the data on the pattern of stock ownership.<sup>11</sup> BFI, for example, is traded on several major stock exchanges and is held by approximately 13,800 different shareholders.<sup>12</sup>

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dependence on the performance of any one firm. If an investor has more wealth invested in one company relative to all others, the investor's average return will naturally be more sensitive to the economic fortunes of that company. See generally Fama, *Foundations of Finance* (1976); Fama & Miller, *The Theory of Finance* (1972); Jensen, *Capital Markets: Theory and Evidence*, 10 Bell J. Econ. 74 (1979).

<sup>11</sup> The shares of larger companies are held predominantly by big investors, like pension funds, life insurance companies, and state and local retirement funds. In contrast, individuals are the principal shareholders of over-the-counter and other smaller listed stocks. See M. Blume & I. Friend, *The Changing Role of the Individual Investor* 3 (1978).

<sup>12</sup> BFI is traded on the New York Stock Exchange, the Pacific Stock Exchange, The Midwest Stock Exchange, and the International Stock

Moreover, the larger a corporation, the smaller is the impact of a given dollar liability on its profits and thus on its share prices. Shareholders of large corporations will therefore be less fearful of a given dollar amount of liability than those of smaller corporations.<sup>13</sup>

As owners of the corporation, shareholders are directly responsible for the conduct of the corporation's business through their selection of the board of directors. The larger the corporation, the less fearful shareholders will be about sustaining corporate liability and the less emphasis they will place on avoiding potential liability. Without large punitive damages awards, the shareholders of a major corporation like BFI will have very little incentive to concern themselves with potential corporate liability, because the profits and share prices of a corporation like BFI are only slightly affected by liability payments, and most shareholders only have a relatively small fraction of their wealth in BFI stock.

By contrast, the shareholders of a small corporation traded over the counter, or one that is not traded at all, will be quite fearful of the risk of liability. Liability payments will have a much larger impact on the profits and share prices of a smaller corporation, and the shareholders are much more likely to have a substantial portion of their finances invested in the corporation. Because the shareholders of smaller corporations already have greater built-in incentives to avoid corporate liability, punitive damages awards do not have to be as high to

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Exchange of the United Kingdom and Republic of Ireland, Ltd. As of December 31, 1988, there were approximately 13,800 stockholders of record of BFI common stock, and in the year ending September 30, 1988, there were 148,071 shares of common stock outstanding. See Browning-Ferris Industries, Inc. 1988 Annual Report 61 (1989).

<sup>13</sup> The California courts have implicitly recognized that one way to equalize the fear of liability between shareholders of large and small corporations, and thus to provide the same level of deterrence for both, is to set a punitive damages award at a magnitude "which affects the company's pricing of its product and thereby affects its competitive advantage . . . ." *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d at 820 (citing *Neal v. Farmers Ins. Exchange*, 21 Cal.3d at 929 n.14). This objective obviously requires higher awards for large corporations.



deter future egregious misconduct.<sup>14</sup>

To summarize, the less shareholders have at stake in a given risk of liability, the less their fear of the liability. With a lower fear of liability, they will be less concerned with providing incentives to corporate decisionmakers to prevent tortious behavior. Thus, higher punitive damages awards are necessary to provide the same level of deterrence as for shareholders who already have more at stake in the potential liability. Because shareholders in a large corporation generally have less at stake in a given risk of liability than shareholders in a small corporation, the size and wealth of a corporation is an economically relevant determinant of the magnitude of the punitive damages awards necessary to achieve deterrence.<sup>15</sup>

## 2. Corporate Wealth is Related to Decisionmakers' Attitudes Towards Corporate Liability

The wealth of a corporation is an economically relevant consideration in assessing punitive damages because decisionmakers in large corporations are more insulated from the consequences of corporate liability payments than decisionmakers in small corporations. The objective of deterring corporate decisionmakers' misconduct therefore requires greater liability for larger corporations.

Corporations are not usually managed directly by shareholders,

<sup>14</sup> In the terminology of economics, shareholders in a small corporation will want the corporation to be managed in a "risk averse" rather than a "risk neutral" way. A "risk neutral" individual is someone who is indifferent to a fair bet, and a "risk averse" person is someone who turns down an even bet. See generally K. Arrow, *Essays in the Theory of Risk-Bearing* (1971).

<sup>15</sup> If these factors were not taken into account, then shareholders in smaller corporations would be forced to suffer greater punitive damages awards than necessary. California courts have recognized that the consideration of wealth in assessing punitive damages is intended in part to protect poor defendants from excessive awards. See, e.g., *Merlo v. Standard Life & Acc. Ins. Co.*, 59 Cal.App.3d at 18 ("[T]he poorer the wrongdoing defendant the smaller the award of punitive damages need be in order to accomplish the statutory objective.").

but rather by employee decisionmakers. Although shareholders make certain decisions about general policy and influence the selection and compensation of high-level corporate management, including the board of directors, most of the daily decisions are made by employees of the corporation. Because the decisionmaking employees of a larger corporation are less likely to be deterred by a given corporate liability payment, punitive damages awards must be higher.

There are several reasons why the decisionmakers in a large corporation are more likely to be insulated from the consequences of corporate liability. In a larger organization, it is inherently more difficult to assign responsibility for misconduct. Decisions are often made by groups or committees, and corporate activities are evaluated and ratified, implicitly and explicitly, at many levels within the organization. Responsibilities are diffuse, and decisionmakers are therefore more likely to be able to conceal or minimize their participation in tortious conduct. As a result, there is substantially less incentive to avoid such conduct.<sup>16</sup>

Moreover, when a decisionmaker's compensation is partly in the form of stock options, the fear of corporate liability will be significantly less in a large corporation because it will have less of an impact on corporate profits and thus on the value of the decisionmaker's stock options. Consider, for example, two managers who each receive 25% of their compensation in the form of stock options. The first manager works for company A with annual profits of \$1 million, and the second manager works for company B with annual profits of \$100 million. If the first manager engages in wrongful conduct that leads to a \$1 million corporate liability, the stock price may plummet and substantially reduce the value of the manager's stock options. By contrast, the same conduct by the second manager will only reduce company B's profits by one percent, and the value of his or her stock

<sup>16</sup> As organizations become larger and more complex, decisionmaking becomes less autonomous. As a result, it becomes increasingly difficult to hold individuals accountable for their roles in the firm's operation. See G. Eads & P. Reuter, *Designing Safer Products: Corporate Responses to Product Liability Law and Regulation* 60-61 (Institute for Civil Justice, Rand Corporation, R-3022-ICJ, 1983).



options will not be significantly affected.

Taken together, the greater diffusion of responsibility within larger corporations, and the lesser impact of liability on the stock options of a larger corporation's decisionmakers, mean that decisionmakers within a larger corporation are less likely to suffer for their misconduct as a result of a given level of corporate liability. To achieve the same level of deterrence for the decisionmakers in a large corporation as already exists for the decisionmakers in a small corporation, it is necessary to impose higher punitive damages awards. Higher punitive damages awards will give larger corporations greater incentive to find and punish the decisionmakers responsible for corporate liability, making them more accountable for their actions.

### **3. Corporate Wealth is Related to the Ability of Corporations to Avoid Detection and Liability for Tortious Conduct**

Larger corporations are more likely to be able to escape liability for their wrongful acts because they generally have better in-house and outside legal counsel, accountants, and other professionals to assist them. Their greater capacity to avoid detection and liability for wrongful acts requires larger punitive damages awards to deter future misconduct.

Larger corporations are far more likely to have high quality in-house and outside professional assistance for the simple reason that they tend to have more at stake in their transactions. With more at stake in the average transaction, larger corporations have a greater incentive to hire high quality in-house professionals and to develop sustained relationships with high quality outside professionals. Once these professional relationships have been established, larger corporations tend to rely upon the same professionals even for less important matters.<sup>17</sup>

<sup>17</sup> The chief legal officer of a company with \$1-10 billion in annual sales receives on average nearly twice the total compensation paid to the chief legal officer in a company with under \$5 million in sales volume. See Steinbrink & Friedman, *Executive Compensation* 28 (1982). Based on common sense and economic theory, one can conclude that the higher

Even before committing a tortious act, larger corporations with more sophisticated professional advice are better able to take measures to avoid the risk of detection and liability. Moreover, if the risk of liability materializes, large corporations are better positioned to avoid liability by using high quality legal counsel who already have ongoing relationships with the corporation, and by devoting substantial resources to the defense of a suit. Larger corporations tend to be more effectively represented in settlement negotiations, and therefore have the capacity to minimize the amount of liability even when liability is inevitable.<sup>18</sup>

The greater resources of larger corporate defendants may also drive up the costs for a victim of tortious misconduct to sue, further decreasing the likelihood of detection and liability.<sup>19</sup> It is reasonable

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compensation paid by larger companies attracts higher quality attorneys. In addition, for the same reasons that it makes sense for larger companies to hire higher quality in-house counsel, it makes sense for them to retain higher quality outside counsel.

<sup>18</sup> Larger corporations are also more likely to have in-house professional staff in the first place. Thus, for example, when a small company without in-house legal counsel faces a potential legal problem, it must incur the added expense of turning to outside counsel, whereas a larger company may turn to its in-house counsel, the cost of which is fixed at least in the short term. Thus, the effective cost of a legal defense is lower for the larger company, and it is more likely to devote its professional resources to escaping liability.

<sup>19</sup> A related factor that influences the likelihood of detection is the magnitude of the harm actually caused by the defendant's conduct. The smaller the harm, the less likely it is that an injured victim will be able to obtain a lawyer and sue. Thus, corporations have a greater likelihood of escaping liability for smaller harms, even large numbers of smaller harms. On the occasions when corporations do get caught causing smaller harms, punitive damages must therefore be set at a higher multiple of compensatory damages than for larger harms in order to achieve full deterrence. This is one of the reasons why it is not desirable to set any fixed ratio of punitive damages to compensatory damages as a matter of law. In this very case, for example, BFI might well have assumed it could easily escape liability because the costs of suing would significantly exceed the compensatory damages.

to assume that the costs of suing a corporate defendant are directly related to its size and wealth, and larger corporations are therefore more likely to avoid being sued, and more likely to be able to hold out for lower settlements when they are sued.<sup>20</sup>

The greater ability of larger corporations to escape detection and liability for their tortious conduct requires higher punitive damages to achieve deterrence. For example, if a corporation can escape liability half the time, it should have to pay twice its expected gains when it does get caught in order to achieve total deterrence. Otherwise, its total punitive damages payments will not be enough to take the profit out of future egregious misconduct. Because larger corporations are more likely to escape liability and detection due to superior legal and other professional assistance, it is reasonable for a state to require that they pay more in punitive damages on the occasions when they do get caught.

#### 4. Corporate Wealth is Related to the Goal of Deterring a Corporate Pattern or Atmosphere of Misconduct

Punitive damages awards calculated to attract the attention of senior management at a large corporation are justified as a means of deterring a pattern of misconduct throughout the corporation caused by senior management's misinformation or underestimation of the chances or costs of potential liability.

When punitive damages are assessed, it is already too late to deter the conduct for which the punitive damages are awarded. The deterrent value of the punitive damages award is not to prevent conduct that has already occurred but rather to serve as a lesson for the future -- the defendant and other potential tortfeasors are put on notice

<sup>20</sup> Some state courts have recognized that, in addition to deterrence and punishment, punitive damages serve other purposes including "compensating victims for otherwise unrecoverable losses, and financing the costs of litigation." *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 679 (1986) (citing Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 3 (1982)).

that egregious misconduct will never be profitable in the future because the total damages award will always exceed the expected gains.

Navistar International argues that as long as punitive damages are always set high enough to take the profit out of egregious misconduct, then senior managers acting in a corporation's financial interests will have sufficient incentive to take the necessary steps to avoid such behavior. Navistar International concludes that it is unnecessary for deterrence purposes to inflate the punitive damages award to draw the attention of senior management in a large corporation. (Amicus Brief at 20-24).

This argument erroneously assumes that senior managers always have perfect information about the risks and costs of potential corporate liability. Even if punitive damages are set so that perfectly informed economic actors would never engage in reprehensible behavior, economic actors without the necessary information may still not be deterred. Thus, senior managers of a corporation may fail to institute appropriate measures to prevent tortious conduct if they underestimate the chances or potential costs of getting caught.

Let us assume, for example, that a large corporation has engaged in a consistent pattern of egregious misconduct despite the fact that punitive damages are always set to exceed the expected gains. Senior managers acting in the corporation's true economic interests would have taken steps to prevent the misconduct throughout the entire corporation. The only plausible explanation for the failure to take such preventive measures is that the senior managers mistakenly underestimated the chances or the costs of liability, or did not have the full information necessary to assess the risks and benefits of the corporation's tortious conduct.

Now let us assume that the corporation is found liable for one of its many acts of misconduct, and the punitive damages award is set high enough to offset the expected gain but not high enough to draw the attention of senior management. The award of punitive damages may then serve to educate and deter the few lower level managers of the corporation who learn of the award, but it will do nothing to affect the future behavior of the senior managers. Not knowing of the award, the senior managers will have no added incentive to gather better information or institute preventive measures throughout the



corporation in order to avoid similar acts of misconduct in the future. They will continue to act or fail to act on the basis of the misinformation that led to the liability in the first place.

Thus, if a corporation is engaged in a consistent pattern of tortious conduct that could be prevented by the senior managers, and the senior managers have permitted it to continue unabated, a punitive damages award large enough to draw their attention is justified as a means of educating them and deterring future misconduct throughout the corporation in the future. Otherwise the corporate atmosphere of tolerance or indifference to egregious misconduct will never be altered.

This is not to say that punitive damages must be set high enough to attract the attention of senior management every time punitive damages are awarded against a corporation. The need to bring senior management's attention to the problem must be left to the discretion of the jury considering the nature of the defendant's conduct. Specifically, the jury must be permitted to consider whether the conduct reflects an isolated instance of low-level misbehavior beyond the control of senior management, or a corporate atmosphere of reprehensible practices tolerated or encouraged by senior managers. If it is the latter, the award should be set high enough to attract the attention of senior management in order to deter future misconduct throughout the entire corporation.<sup>21</sup>

In those cases where the jury decides it is necessary to send a message to senior management, the size and wealth of the corporation will properly be the primary determinant of the size of the punitive damages award. The bigger and wealthier the corporation, the larger the award will need to be to draw the attention of senior managers who have the capacity to institute deterrent measures applicable to the whole organization. Thus, in these circumstances, a corporation's wealth is a relevant factor to consider in order to achieve full

<sup>21</sup> In this case, the jury could reasonably have inferred that the failure of BFI's Houston headquarters to respond to Kelco's letter warning of the illegal conduct reflected general corporate tolerance or encouragement of reprehensible business practices at the highest levels.

deterrence through the award of punitive damages.<sup>22</sup>

## **B. Corporate Wealth Must Be Taken Into Account To Achieve the Retributive Purpose of Punitive Damages**

Retribution is the second primary goal of punitive damages. See *Smith v. Wade*, 461 U.S. 30, 54 (1983) (citing *Restatement (Second) of Torts* § 908(1) (1979)). This Court recognized over a century ago that wrongdoers "are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured." *Day v. Woodworth*, 54 U.S. (13 HOW.) 363, 371 (1852). This retributive objective of punitive damages is directly linked to a defendant's wealth for three primary reasons.

First, retribution cannot be accomplished by assessing monetary damages against a corporation if the amount of money is trivial in comparison to its total net worth. Just as a \$1,000 fine means nothing to a millionaire but everything to a person with moderate income, a \$1 million punitive damages award may mean nothing to a multinational corporation but everything to a small company. If both a multinational corporation and a small company commit the same reprehensible act, punishing them both with the same amount of money is in effect punishing the small company much more. The larger corporation must therefore be assessed a greater monetary penalty to achieve the same punishment.<sup>23</sup>

<sup>22</sup> There is no merit to the argument that a large award of punitive damages overdeters socially beneficial behavior. There can be no over-deterrence of the kind of reprehensible behavior punitive damages are intended to prevent. "[S]ociety has an interest in deterring and punishing all intentional or reckless invasions of the rights of others, even though it sometimes chooses not to impose any liability for lesser degrees of fault." *Smith v. Wade*, 461 U.S. 30 at 54-55 (emphasis in original). Even if it is difficult to distinguish between legal conduct and some kinds of tortious behavior, it is surely not too difficult to distinguish between legal conduct and the kind of despicable tortious behavior warranting punitive damages.

<sup>23</sup> See, e.g., *Keefe v. Gimbel's*, 124 Misc.2d 658, 478 N.Y.S.2d 745, 750-51 (1984) ("[W]hat would be a punishment to the 'mom and pop'



Second, if a multinational corporation with billions in assets commits the same wrongful conduct as a small company struggling to survive, its conduct is inherently more reprehensible and therefore deserving of greater punishment. By analogy, a millionaire who steals a loaf of bread from the corner grocery store should be punished more for his or her conduct than a person without food or income, not only because a bigger fine is necessary to inflict the same relative penalty but also because the millionaire's conduct is morally more repugnant. Society has a right to demand greater retribution against wealthy wrongdoers who commit economic crimes solely to enhance their already considerable fortunes.

Third, punitive damages must be higher in larger corporations to punish the individual wrongdoers directly responsible for the corporation's tortious behavior. For the reasons described above, responsibilities are more diffuse in larger corporations and individual wrongdoers are more difficult to identify and punish. Higher punitive damages awards are therefore necessary to encourage larger corporations to punish the specific individuals responsible for the corporation's reprehensible conduct.<sup>24</sup>

Petitioners and amicus Navistar International go to great lengths to characterize corporate shareholders as "innocent" victims of the corporation's vicarious liability, who are therefore not deserving of any punishment at all. (See Petitioner's Brief at 43; Navistar International Amicus Brief at 14-15.) Their arguments are disingenuous. As owners of the corporation, shareholders have ultimate responsibility for its conduct. By investing in the corporation, shareholders deliberately assume both the benefits and the burdens of the corporation's economic activities. See *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 817 (6th Cir. 1982) ("Punitive damages are a risk that accompanies investment."). Moreover, deterrence and

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corner grocery store would scarcely be a deterrent for the affluent multi-store chain such as the defendant herein.").

<sup>24</sup> This Court has recognized that punishment of individuals responsible for an organization's tortious behavior is a legitimate objective of punitive damages. See *Newport v. Facts Concerts, Inc.*, 453 U.S. at 266-67.

retribution are both served by causing shareholders to pay for choosing managers of a corporation who commit or fail to prevent egregious conduct giving rise to punitive damages.

This basic principle of accountability has expressly been acknowledged by this Court. In *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), the Court held that there was no constitutional impediment to holding corporations liable for punitive damages awards arising from the willful torts of their employees. Rejecting the argument that punitive damages may constitutionally be assessed only against those directly at fault, the Court stated:

[The Legislature] may impose an extraordinary liability such as the present, not only upon those at fault but upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented.

*Id.* at 116.

In sum, corporate wealth is relevant to the assessment of punitive damages for the purposes of both deterrence and retribution. There is nothing in the Constitution requiring the states to adhere to the economic theories of corporate defendants who argue to the contrary.

## CONCLUSION

The logical extension of Navistar International's economic arguments is that a state may not fine a wealthy person more for stealing bread than it fines a poor person for the same conduct. Under its theory, if the fine exceeds the cost of the bread multiplied by the chance of being caught, it would be excessive. And, according to Navistar International, economic theory entitles corporations to more protection under the Eighth Amendment and somehow makes them even less an appropriate subject of punitive damages than individual defendants.

The reverse is of course true. The Eighth Amendment was intended for individuals, not large corporations. Sound economic theory supports this nation's historical judgment that states should be free to deter wrongful conduct within their own borders. And it

supports the judgment of the states that punitive damages based in part on the wealth of the wrongdoer are an appropriate and necessary means of deterring and punishing reprehensible conduct by corporations and individuals alike.

The doctrine of punitive damages has been an essential tool for deterrence and punishment of egregious behavior for over two centuries, since even before the Eighth Amendment was ratified by the states. State courts and state legislatures have developed and refined the doctrine over time to respond to changing societal conditions, and to improve its effectiveness in achieving the prevention and punishment of reprehensible conduct. To read an inflexible federal standard of excessive punitive damages into the Eighth Amendment would intrude upon this traditional domain of the states for no good legal or economic reason.

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**AMICUS CURIAE**

**BRIEF**



23  
No. 88-556

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. AND  
BROWNING-FERRIS INDUSTRIES, INC.,  
v. *Petitioners,*

KELCO DISPOSAL, INC. AND JOSEPH KELLY,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

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No. 88-556

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BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. AND  
BROWNING-FERRIS INDUSTRIES, INC.,  
*Petitioners,*

v.

KELCO DISPOSAL, INC. AND JOSEPH KELLY,  
*Respondents.*

---

On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

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**BRIEF FOR *AMICUS CURIAE*  
MARTHA HOFFMANN SANDERS  
IN SUPPORT OF RESPONDENTS**

---

**INTEREST OF *AMICUS CURIAE***

Martha Hoffmann Sanders ("Sanders") was awarded punitive damages in a wrongful death action now on appeal before the Alabama Supreme Court. Her sixteen year old daughter, Norma Hoffmann, was the innocent victim of a high speed nighttime drag race on a residential street in Montgomery, Alabama between two intoxicated defendants, Thomas Clardy and James Kervin. Miss Hoffmann was killed when Clardy, driving a pickup truck at over 80 miles per hour, smashed head-on into the auto-

mobile she was driving after Clardy swerved across the double yellow line into her lane. The jury awarded *amicus* \$2.75 million in punitive damages under an Alabama wrongful death of a minor statute that permits "punitive damages," but prohibits compensatory damages, in such cases.

*Amicus* is concerned that in deciding this case, the Court will fashion a broad or inflexible constitutional rule for measuring the "excessiveness" of punitive damage awards that will apply equally throughout the entire spectrum of such awards. Thus, she would like to inform this Court of the particular facts of her case and the peculiarities of Alabama's wrongful death statutes, which clearly distinguish *amicus*' case from the instant case, and illustrate the wisdom of resolving this case narrowly.

Punitive damages are awarded in extraordinarily diverse circumstances, ranging from purely economic torts committed by corporate entities, as in the instant case, to wrongful death committed by individuals, as in *amicus*' case. The purpose of this *amicus* brief is to urge the Court to resolve the instant case on narrow grounds, leaving for another day the appropriate test for determining the excessiveness of punitive damage awards in circumstances not presently before the Court.

Petitioners and respondents have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk.

#### SUMMARY OF ARGUMENT

This case is near one end of the spectrum of cases involving the award of punitive damages. It involves, as petitioners assert, an economic tort arising out of commercial competition resulting in no physical injury, in which both parties are for-profit corporations. It is unlike cases near the other end of the spectrum, such as that of *amicus*, involving wrongful death committed by

individuals under circumstances evidencing wanton disregard for public safety. If the Court rules that the Excessive Fines Clause of the Eighth Amendment applies to civil actions in which punitive damages are awarded, it should not establish a broader test for determining when a particular award is excessive than is required by the facts of the instant case. Point I.

Another reason for deciding the instant case narrowly is that two of the factors petitioners urge for deciding whether an award is excessive—proportionality between the compensatory award and the punitive award and a legislative judgment to cap damages for similar conduct—are inapplicable to the facts in *amicus*' case. Point II.

Finally, if as petitioners' urge, there is a nonconstitutional, federal common law ground available for deciding this case, the Court should decide the case on that ground alone. Point III.

#### ARGUMENT

Petitioners and respondents have comprehensively briefed whether the Excessive Fines Clause and the Due Process Clause of the U.S. Constitution are applicable to the punitive damage award in this case. *Amicus* will not address those issues. Instead, *amicus* will make three brief but important points. First, the Court should not fashion any rule governing punitive damage awards that is broader than necessary to resolve the particular case presently before it. Second, if the Court holds that the Excessive Fines Clause is applicable to civil suits, it should not fashion any rigid rule for measuring whether a particular punitive damage award is excessive; rather, the Court should allow substantial flexibility so that the idiosyncracies of state laws and the particular facts of individual cases can be taken into account. Finally, before resolving any constitutional questions, the Court should consider carefully whether the instant case can be

resolved on the federal common law ground urged by petitioners in Point III of their brief.

# **I. THE COURT SHOULD RESTRICT ITS HOLDING TO THE PRECISE QUESTION BEFORE IT.**

The Question Presented is: "Whether an award of \$6,000,000 in punitive damages, amounting to more than 100 times the plaintiff's actual damages from a purely economic tort, is excessive under the Eighth Amendment or otherwise." Brief for Petitioners at (i). There are three noteworthy aspects to this Question. First, petitioners do not ask the Court to rule that *all* punitive damage awards are unconstitutional; the question is whether, under the circumstances of this case, this particular award is excessive under the Eighth Amendment. Second, the Question assumes the existence of a compensatory award, and petitioners then argue that the Excessive Fines Clause requires proportionality between the compensatory award and the punitive award. *Id.* at 28-30. Thus, the Court need not and should not rule that such proportionality is required in cases where compensatory damages are unavailable to the plaintiff. Third, this case arises in the context of an "economic tort" by a large national corporation. Thus, the Court need not and should not announce a test for determining the excessiveness of punitive awards in cases involving wrongful death committed by individuals or small local businesses.

In the instant case, respondents (plaintiffs below) alleged federal antitrust violations and tortious interference with business relations under state law. The jury returned a verdict in their favor on both grounds and awarded \$51,146 in compensatory damages and an additional \$6,000,000 in punitive damages. Brief for Petitioners at 2-6. Petitioners themselves emphasize the narrow issue before the court. The case involved "a routine economic tort growing out of commercial competition,"

*id.* at 9, "causing little harm." *Id.* at 38. "No threats or intimidation were directed against Kelco's employees or customers [and] no property was destroyed." *Id.*

Petitioners assert that their conduct did not "involve particularly offensive behavior, such as *physical violence, destruction of property, or breach of trust.*" *Id.* at 9 (emphasis added). They bemoan the "recent phenomenon" of awarding punitive damages beyond "that small fraction of cases where the challenged conduct was egregiously offensive." *Id.* at 10. Borrowing from this Court's opinion in *Solem v. Helm*, 463 U.S. 277 (1983),<sup>1</sup> in which the Court acknowledged that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence," *id.* at 292-293, petitioners agree that "[a] larger punitive damages award could thus be justified in cases of particularly egregious misconduct such as violent criminal behavior or acts involving a *wanton disregard for the public safety . . . .*" Brief for Petitioners at 38 (emphasis added).<sup>2</sup>

Petitioners raise other concerns they consider germane to imposing or reviewing punitive damage awards. They question the size of the award in this case because of the potential for jury bias, particularly against "a large out-of-state corporation" viewed as a deep pocket pitted against "a sympathetic local plaintiff." *Id.* at 12 n.4; *see id.* at 42. They argue that the wealth of a corpora-

<sup>1</sup> In *Solem* the Court held that the Cruel and Unusual Punishments Clause of the Eighth Amendment barred the State from imposing a sentence of life imprisonment without the possibility of parole for a seventh nonviolent felony.

<sup>2</sup> Petitioners further assert that the state law claim of "non-violent tortious interference with business relations does not even appear to be a crime in Vermont." *Id.* at 40. In fact, petitioners advance the policy argument that an excessive punitive damage award for predatory pricing could deter the socially useful, pro-competitive conduct of price reductions by commercial businesses. *Id.* at 37.



tion should be irrelevant to the size of the punitive damage award levied against it but they do not make that argument with respect to torts committed by individuals: "[T]he instinct that wealth is relevant to punishment has far more plausibility as applied to individuals rather than organizations and as applied to wrongs that have non-economic rather than economic motives." *Id.* at 43. Petitioners argue that the deterrent and retributive interests served by punitive damage awards are more relevant to individuals than to large publicly-held corporations, particularly because the economic impact would fall on innocent shareholders rather than the corporate employees who committed the wrongful acts. *Id.* at 43-44.

Finally, petitioners argue for a return to the historic principles that have guided the assessment of punitive damages. "In the past, punitive awards generally bore a discernible relationship to the offensiveness of the defendant's behavior. . . ." *Id.* at 11. Thus, petitioners find no problem with punitive damages that are proportionate "to the conduct for which [they are] imposed." *Id.* at 28. Petitioners urge the Court to review the award in this case under the constitutional criteria identified in *Solem* and those gleaned from the common law, including the gravity of the offense, the injury inflicted by the defendant, and the character of the defendant's conduct. *See id.* at 33. These factors, petitioners state, "together map out a range of punitive damages awards that will survive Eighth Amendment scrutiny because they are reasonably necessary to serve the purposes of deterring or punishing the defendant's conduct." *Id.*

Without necessarily agreeing with petitioners' arguments, *amicus* notes that the facts in the instant case on which petitioners rely to argue that the imposition of a \$6,000,000 award against petitioners was excessive are clearly distinguishable from the facts of her case; indeed the criteria urged by petitioners to evaluate the exces-

siveness of punitive damage awards would support the award in her case.

*Amicus* brought a civil action under Ala. Code § 6-5-391 (1975), Alabama's wrongful death of minor statute, which permits parents to bring such an action for the wrongful death of their child. *Amicus'* daughter, Norma Hoffmann, a 16 year old high school honor student, was killed when the automobile she was driving was smashed into head-on by a pickup truck operated by one of the defendants, Thomas Clardy. Miss Hoffmann was driving with a passenger, a high school friend, who was seriously injured in the collision. Clardy was drag racing with an automobile driven by James Kervin, a codefendant, who had had five speeding violations in the preceding three years. The defendants were racing in a residential neighborhood late at night. The estimated speed of the two racing vehicles at the time of the collision was over 80 miles per hour in a 35 miles per hour zone.

Norma Hoffmann died when Clardy attempted to pass Kervin, lost control of his truck, crossed over the double yellow line, and collided head-on into her car. Both he and Kervin were intoxicated at the time.<sup>3</sup> The police investigation concluded that Miss Hoffmann in no way was at fault. She was driving on the correct side of the road, within the permitted speed limit, with her headlights on, and was not intoxicated.

Following a lengthy jury trial, *amicus* was awarded \$2.75 million in punitive damages for the wrongful death of her daughter under a statute whose primary purposes are to punish defendants and to deter others

<sup>3</sup> *E.g.*, it was admitted that Clardy had a blood alcohol level of 0.21% at the time of the collision, far above the level of legal intoxication in all jurisdictions. *See, e.g.*, Ala. Code § 32-5A-191 (a)(1) ("A person shall not drive . . . while there is 0.10 percent or more by weight of alcohol in his blood").

from similar conduct. See *Nettles v. Bishop*, 289 Ala. 100, 266 So.2d 260 (1972).<sup>4</sup>

The Court has repeatedly noted that punitive damages are awarded "to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Welch, Inc.*, 418 U.S. 323, 350 (1974); accord *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. —, 108 S.Ct. 1645, 1655 (1988) (O'Connor, J., concurring in part and concurring in the judgment); *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986); *Smith v. Wade*, 461 U.S. 30, 54 (1983); *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979); see Restatement (Second) of Torts, § 908(1) (1979). They are awarded for outrageous conduct evidencing evil motive or intent or "reckless or callous indifference to the rights" of others. *Smith v. Wade*, 461 U.S. at 55.

Whatever the applicability of these principles to petitioners' case, they are clearly applicable to *amicus*' case. Moreover, the facts and circumstances of *amicus*' case fall squarely within the principles that petitioners' themselves urge the Court to apply in deciding whether the punitive damage award against them was excessive. One

<sup>4</sup> In contrast to petitioners' assertion that their conduct is apparently not a crime under state law, see *supra* n.2, Clardy's and Kervin's conduct is punishable under a variety of criminal statutes under Alabama law. See, e.g., Murder, which is defined, *inter alia*, as causing death under circumstances manifesting extreme indifference to human life, Ala. Code § 13A-6-2(a)(1); manslaughter, which is defined, *inter alia*, as recklessly causing the death of another person, Ala. Code § 13A-6-3(a)(1); and criminally negligent homicide, which is defined as causing the death of another person by criminal negligence, Ala. Code § 13-6-4(a). Alabama also criminalizes improperly overtaking a vehicle on the left, Ala. Code § 32-5A-84; driving at an unreasonable and imprudent speed, Ala. Code § 32-5A-170; exceeding 30 miles per hour in an urban district, Ala. Code § 32-5A-171; reckless driving, Ala. Code § 32-5A-190; "drag racing," Ala. Code § 32-5A-178; and driving under the influence of alcohol, Ala. Code § 32-5A-191.

young woman died and another was seriously injured as the direct result of physically violent and destructive behavior by two intoxicated drivers drag racing in a residential neighborhood, conduct that by no stretch of the imagination can be described as even potentially socially useful, and is, in fact, criminally punishable. Such conduct evidenced, at the least, a wanton disregard for human life and public safety.<sup>5</sup> The defendants were not large out-of-state corporations pitted against a favored local plaintiff but rather the immediate relatives of prominent local citizens.<sup>6</sup>

The offense was atrociously grave, the injury fatal, and the character of defendants' conduct unmitigatingly contemptible. These are the characteristics petitioners believe to be, and this Court has held to be, quintessentially deserving of substantial punitive damages because "they are reasonably necessary to serve the purposes of deterring or punishing the defendant's conduct." Brief for Petitioners at 33; *Solem v. Helm*, 463 U.S. 277, 290-293 (1983). These are, as well, the precise interests reflected in Alabama's wrongful death statutes.

The kinds of cases *amicus* represents should be kept in mind when the Court decides the instant case. Petitioners' case is near one end of the spectrum, an economic tort affecting corporations; *amicus*' case is near the other—violent malfeasance causing death and physical in-

<sup>5</sup> In *Smith v. Wade*, 461 U.S. 30 (1983) the Court held that punitive damages are available in claims brought under 42 U.S.C. § 1983 when the defendant's conduct is shown to be motivated, *inter alia*, by reckless or callous indifference to human life. Recklessness, the Court said, was akin to wantonness. "Wanton means reckless—without regard to the rights of others. . . . Wantonness is defined as a licentious act of one man towards the person of another, without regard to his rights." *Id.* at 39 n.8, quoting 30 *American and English Encyclopedia of Law* 2 (2d ed. 1905).

<sup>6</sup> For example, one of Clardy's sisters was a local district judge; another was a local district attorney.



jury to individuals, by individuals. The fact that punitive damages are awarded in such a broad range of cases suggests that it would be appropriate for the Court to resolve the instant case as narrowly as possible.

**II. PETITIONERS' ARGUMENT THAT A PUNITIVE DAMAGE AWARD IS EXCESSIVE IF IT IS DISPROPORTIONATE TO THE COMPENSATORY DAMAGE AWARD AND FALLS OUTSIDE A LEGISLATIVELY PRESCRIBED RANGE IS INAPPLICABLE TO CASES SUCH AS THAT OF *AMICUS* WHERE COMPENSATORY DAMAGES ARE UNAVAILABLE AND THE LEGISLATURE HAS DELIBERATELY CHOSEN NOT TO APPLY A CAP ON PUNITIVE DAMAGES FOR CERTAIN TYPES OF CONDUCT.**

Petitioners argue that the proportionality between the compensatory and punitive damage awards should be used as one important factor in determining whether a particular punitive damage award is excessive. It is the compensatory award, they state, which reflects "[t]he extent of the injury inflicted." Brief for Petitioners at 34. Petitioners further argue that legislative judgments concerning the maximum fines and penalties authorized for similar conduct are other benchmarks in determining excessiveness. Neither argument is applicable to *amicus*' case, supplying another powerful reason why the instant case should be decided narrowly.

In *amicus*' case, no compensatory damages were awarded because they are barred under Alabama's wrongful death of a minor statute, Ala. Code § 6-5-391 (as well as its companion general wrongful death statute, Ala. Code § 6-5-410). As construed by the Alabama Supreme Court, § 6-5-391 "is designed to furnish a complete system for all actions for the death of a minor child." *Eich v. Town of Gulf Shores*, 293 Ala. 95, 97, 300 So.2d 354, 356 (1974). "[T]he damages recoverable under this section are entirely punitive and are based

on the culpability of the defendant and the enormity of the wrong, and are imposed for the preservation of human life." *Id.* at 98, 300 So.2d at 356.<sup>7</sup> Alabama wrongful death plaintiffs are precluded from offering evidence of pecuniary loss, earning capacity, occupation, or mental suffering. See *Bonner v. Williams*, 370 F.2d 301 (5th Cir. 1966). Thus, petitioners' proportionality rule cannot be applied in all circumstances. To do so would ignore Alabama's legislative judgment that permits punitive damages, but bars compensatory damages, in wrongful death actions and would effectively repeal Alabama's wrongful death statutes.

Petitioners acknowledge that "the states have substantial leeway to structure and limit the size of punitive damages awards to whatever extent, if any, they deem appropriate." Brief for Petitioners at 30. And they grant that an "award of punitive damages that is unrelated to the amount of compensatory damages may in some circumstances be upheld if it is sufficiently justified by . . . other factors." *Id.* at 35 n.21.<sup>8</sup> Those other factors are present in *amicus*' case and have been recognized by the courts of Alabama. Damages under both of Alabama's wrongful death statutes are based on the culpability of the defendant, the enormity of the wrong, and to deter the wrongful taking of human life. See *Estes Health Care Centers, Inc. v. Bannerman*, 411 So.2d 109 (Ala. 1982); *Deaton, Inc. v. Burroughs*, 456 So.2d 771 (Ala. 1984); *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300

<sup>7</sup> The Alabama wrongful death statute "has been judicially interpreted to authorize the recovery of only punitive damages." *Black Belt Wood Co., Inc. v. Sessions*, 514 So.2d 1249, 1262 (Ala. 1986).

<sup>8</sup> "It is no objection that there are special situations in which the amount of compensatory damages may not supply an appropriate basis for assessing the reasonableness of a punitive damages award. For example, a trebling of compensatory damages might be inadequate where only nominal compensatory damages are awarded." *Id.*



So.2d 354 (1974); *Magnusson v. Swan*, 291 Ala. 151, 279 So.2d 422 (1973).

Petitioners' second point, that a punitive damage award should be evaluated by comparing it to penalties imposed by the legislature for the same and similar misconduct, is also inapplicable to Alabama's wrongful death actions. Indeed, in such cases, the "legislative judgment" argument cuts the other way. In 1987, Alabama enacted a "tort reform" act prohibiting the award of punitive damages in civil suits unless there is clear and convincing evidence that the defendant "engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff." Ala. Code § 6-11-20. In addition, the legislature imposed a \$250,000 cap on punitive damages unless such damages were based on a pattern or practice of intentional wrongdoing, the conduct involved actual malice (other than fraud), or was defamatory. Ala. Code § 6-11-21. However, the Act explicitly excluded from the evidentiary requirements and the cap, "any civil actions for wrongful death pursuant to sections 6-5-391 and 6-5-410." Ala. Code § 6-11-29.

Petitioners concede that a "legislature's decision to authorize the imposition of a particular offense reflects a finding . . . that there is an appropriate relationship between the sanction and the offense." Brief for Petitioners at 31. In such cases, they say, "the legislature's determination of reasonableness plainly should be accorded considerable deference." *Id.* at 31-32. The Alabama legislature was well aware of the judicial interpretations of its century-old wrongful death statutes and of the punitive damage awards imposed under them. But when it decided to place caps on punitive awards in other classes of cases, it consciously exempted wrongful death actions from such caps.<sup>9</sup>

<sup>9</sup> "The history of the wrongful death statute indicates that the legislature is aware of the interpretation placed on the statute by

In a related argument, petitioners complain that the punitive damage award against them was rendered by a jury "exercising unlimited and basically unguided discretion" because the jury did not choose the award from a "legislatively-established spectrum of permissible punitive damages awards for the kind of wrong BFI was found to have committed." Brief for Petitioners at 32. As explained, in *amicus'* case, the Alabama legislature affirmatively decided not to create a range or cap of permissible punitive damages in wrongful death actions. Thus, the jury's award of \$2.75 million was within the legislatively-established spectrum of permissible awards. That is not to say, however, that the jury's discretion was unlimited. To the contrary, in Alabama wrongful death actions, the jury's determination is subject to searching and meaningful review by the trial and appellate courts.

In 1986, the Alabama Supreme Court required trial courts to create detailed records whenever they are asked to alter a jury verdict on grounds of excessive damages. These records must analyze such factors as the proper operation of the jury, the culpability of the defendant's conduct, the desirability of deterrence, the impact on the parties, the impact on innocent nonparties, and the financial position of the defendant. *See Green Oil Co. v. Hornsby*, No. 86-1553, slip op. (Ala. Jan. 13, 1989); *Hammond v. Gadsen*, 493 So.2d 1374, 1378-1379 (Ala. 1986). "Only by requiring that a record be made can this Court adequately discharge its role of appellate review of trial court action in either granting or refusing to grant a new trial where remittitur is granted or denied." *Id.* at 1379. Such a "*Hammond*" hearing occurred in *amicus'* case. The defendants filed Motions for Judgment Notwithstanding the Verdict, a New Trial, and a

this Court, and it has not amended it." *Black Belt Wood Co., Inc. v. Sessions*, 514 So.2d 1249, 1263 (Ala. 1986).

Remittitur. The trial court conducted an extensive evidentiary post-trial hearing on these issues and thereafter entered an order denying defendants' post trial motions. It subsequently entered an order setting forth the *Hammond* factors it considered in refusing to find the punitive damage award excessive. See RT Vol. VII, 1-116; CR 241-245, *Clardy v. Sanders*, C.A. No. CV-87-448-G (Ala. Cir. Ct. 1988).

One of the factors the Court has found important in deciding to uphold death penalty statutes against Eighth Amendment claims is whether those statutes provide an opportunity for meaningful appellate review. "Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). In Alabama, the "*Hammond*" hearing provides the same safeguard of meaningful appellate review—indeed, that is its explicit purpose.

In sum, tests for measuring excessiveness urged by petitioners are not applicable to all cases and all States. *Amicus* respectfully requests that the Court not fashion a rule that ignores legislative determinations and practices in jurisdictions, such as Alabama, where an explicit decision has been made not to permit compensatory damages and not to cap the award of punitive damages, and where the "excessiveness" of an award is subject to meaningful judicial review.<sup>10</sup>

<sup>10</sup> "[W]hile juries in assessment of punitive damages are given a discretion in determining the amount of damages, this discretion is not unbridled or arbitrary but a legal, sound, and honest discretion." *Crenshaw v. Alabama Freight, Inc.*, 287 Ala. 372, 381, 252 So.2d 33, 41 (1971).

### III. IF THE COURT AGREES THAT THE PUNITIVE DAMAGE AWARD IN PETITIONERS' CASE CAN BE SET ASIDE ON NONCONSTITUTIONAL GROUNDS, THIS CASE SHOULD BE DECIDED ON THOSE GROUNDS ALONE.

Petitioners assert that the federal courts have a common law right to "superintend the rationality of punitive damages awarded by federal juries." Brief for Petitioners at 50. They urge, as an alternative nonconstitutional ground for setting aside the punitive damage award against them, that this Court exert its supervisory powers and declare the award in their case excessive. *Amicus* will not address the merits of that argument. However, if the Court believes there is a nonconstitutional ground for resolving the instant case, it should decide the case solely on that ground.

In 1936, Justice Brandeis in his famous concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), noted this Court's longstanding rule that it "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Id.* at 347.<sup>11</sup> That principle has been reaffirmed many times by the Court. See, e.g., *Employment Div., Dep't. of Human Res. of the State of Oregon v. Smith*, 108 S.Ct. 1444, 1452 (1988); *Lyng v. Northwest Indian Cemetery Prot. Ass'n.*, 108 S.Ct. 1319, 1323 (1988); *United States v.*

<sup>11</sup> Quoting *Liverpool, N.Y. & P.S. Co. v. Emigration Comm'rs.*, 113 U.S. 33, 39 (1885), Justice Brandeis also noted that the Court should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." 297 U.S. at 347. That principle, of course, is applicable to Points I & II of this *amicus* brief.

*Locke*, 471 U.S. 84, 92 (1985); *see also Thompson v. Oklahoma*, 108 S.Ct. 2687, 2711 (1988) (O'Connor, J., concurring in judgment).

This time-honored principle is particularly applicable here where the punitive damage award was based on a violation of state law. There is no need to reach out for a constitutional resolution that implicates state-federal relations if the instant case can be resolved on an alternative common law ground. Should the Court believe such an alternative ground is available, it should dispose of this case solely on that ground, without reaching the constitutional question.

#### CONCLUSION

For the foregoing reasons, the Court should refrain from deciding the constitutional questions before it if the instant case can be resolved on common law grounds, but if the Court reaches the constitutional questions, it should formulate a rule no broader than required by the precise facts of this case.

Respectfully submitted,

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**AMICUS CURIAE**

**BRIEF**

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**IN THE  
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OCTOBER TERM, 1988**

**BROWNING-FERRIS INDUSTRIES OF VERMONT  
AND BROWNING-FERRIS INDUSTRIES, INC.  
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**v.**

**KELCO DISPOSAL, INC., AND JOSEPH KELLY  
Respondents**

**On Writ of Certiorari to the  
United States Court of Appeals for the  
Second Circuit**

**BRIEF OF AMICI CURIAE CONSUMERS UNION OF  
U.S., CONSUMER FEDERATION OF AMERICA, NA-  
TIONAL CONSUMERS LEAGUE, NATIONAL WOMEN'S  
HEALTH NETWORK, CENTER FOR SCIENCE IN THE  
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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1988

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BROWNING-FERRIS INDUSTRIES OF VERMONT  
AND BROWNING-FERRIS INDUSTRIES, INC.  
Petitioners

v.

KELCO DISPOSAL, INC., AND JOSEPH KELLY  
Respondents

---

On Writ of Certiorari to the  
United States Court of Appeals for the  
Second Circuit

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BRIEF OF AMICI CURIAE CONSUMERS UNION OF  
U.S., CONSUMER FEDERATION OF AMERICA, NA-  
TIONAL CONSUMERS LEAGUE, NATIONAL WOMEN'S  
HEALTH NETWORK, CENTER FOR SCIENCE IN THE  
PUBLIC INTEREST, U.S. PUBLIC INTEREST  
RESEARCH GROUP, TRIAL LAWYERS FOR PUBLIC  
JUSTICE, AND WOMEN'S EQUITY ACTION LEAGUE  
IN SUPPORT OF RESPONDENTS

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**STATEMENT OF CONSENT AND  
INTEREST OF THE AMICI CURIAE**

This brief is filed with the consent of the parties.

The Consumers Union of United States, is a non-profit membership organization founded in 1936. It engages in consumer advocacy before the executive, judicial, and legislative branches of government.

Consumer Federation of America is a coalition of over 200 national, state, and local consumer, senior citizen, labor, farm, cooperative, and rural organizations representing more than 30 million people in matters pertaining to the well-being of the American consumer.

The National Consumers League has worked for safety and fairness of consumers and workers since 1899. The League seeks to ensure that consumer and worker protections are enforced and updated by supporting necessary legal action.

The National Women's Health Network

is a public interest organization whose membership, comprised of 10,000 individuals and 400 organizations representing 500,000 women, seeks to give women a voice in the health care system in the United States.

The Center for Science in the Public Interest is a nonprofit consumer advocacy and educational organization supported by more than 140,000 individual members. Since 1971 CSPI has been concerned with federal public health policies and corporate practices that affect the public health.

U.S. Public Interest Research Group is the national office for state PIRGs across the country. PIRGs are nonprofit, nonpartisan consumer and environmental advocacy organizations.

Trial Lawyers for Public Justice, P.C., is the national public interest law firm dedicated to using tort law to

advance the public good. Utilizing a nationwide network of top plaintiffs' trial lawyers, TLPJ brings tort cases designed to advance consumer and victims' rights, environmental protection and safety, civil rights, and civil liberties, occupational health and employees' rights, and the protection of the poor and powerless. The TLPJ regularly seeks both compensatory and punitive damages on behalf of the victims of outrageous conduct.

Women's Equity Action League was founded in 1968 as a national nonprofit membership organization specializing in economic issues affecting women. WEAL sponsors research, education projects, litigation, and legislative advocacy.

The amici are deeply committed to preserving the role of punitive damages in assuring a responsive and consumer-oriented tort system. Maintaining a strong tort system, including a mechanism



that permits punitive damages in appropriate circumstances, is of critical importance to the members of each organization. Without such a system, the members of these organizations will be denied an essential private sector ordering mechanism, resulting in the potential for higher prices fostered by undue concentration and poor customer service. Maintenance of the Vermont tort system, including punitive damages, serves the interests of Consumers Union, the Consumer Federation of America, and the National Consumers League.

#### SUMMARY OF ARGUMENT

This case concerns the propriety of punitive damages under Vermont tort law as interpreted by the United States Court of Appeals for the Second Circuit. It is contended that punitive damages awarded under that system violate the Eighth Amendment prohibition against excessive fines.

The Eighth Amendment derives from the English Bill of Rights, and the English Bill of Rights articulates certain values found in the Magna Carta. Neither the Magna Carta, the English Bill of Rights, nor the Eighth Amendment impose any constraints on private tort law judgments. All three documents address the relationship between the executive and the citizenry.

The English Bill of Rights and the Eighth Amendment prohibit the executive branch from imposing harsh or excessive sanctions in criminal cases. The relevant provision of the Magna Carta permits the King to collect amercements (fines or specialized taxes) only if a jury of peers determines the amount to be amerced. Amercements were to be proportional to the harm done to the King and bore no relationship to the embryonic civil tort system.

The conclusion that a civil damage proportionality requirement can be generalized from these historic documents is counter to history. All Commonwealth countries apply these documents to their legal systems, and all have punitive damages without any reference to this view of history.

The Eighth Amendment applies only to criminal sanctions. It can be applied to civil fines imposed by the legislature if the purpose and effect of those fines parallels precisely the criminal law in all respects.

Punitive damages are civil; to apply the Eighth Amendment it must be established that they are for all purposes a criminal sanction. That conclusion contravenes 200 years of caselaw, ignores findings by this Court declaring punitive damages to be part of traditional state law, ignores the fact that punitives are

not legislative in origin, and ignores the full range of purposes underlying punitive damages. Therefore, this Court should hold that the Eighth Amendment does not apply to punitive damages.

If this court holds otherwise and decides to review punitive damages under the Eighth Amendment, the Vermont system will survive scrutiny. Punitive damage awards made by properly instructed juries, subject to remittitur and appellate review, comport with basic notions of fairness. A fixed ratio between punitive damages and compensatory damages is arbitrary and unfair. Punitive damages punish gross misconduct, deter future misconduct, and serve other functions central to the civil tort system. To preserve the constitutional and beneficial system of punitive damages, the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

## ARGUMENT

### I

#### NEITHER BRITISH HISTORY NOR COMMON LAW SUPPORTS THE PROPOSITION THAT THE AMERCEMENTS CLAUSE IN THE MAGNA CARTA HAD THE PURPOSE OR EFFECT OF LIMITING CIVIL DAMAGES

##### A. The Magna Carta Did Not Articulate Requirements Applicable to Disputes Between Private Parties.

The petitioners contend that the Amercements Clause of the Magna Carta (Chapter 20) is the precursor to the excessive fines clause in the Eighth Amendment. They have argued that the Amercements Clause, both when written and later reinterpreted, required limits on both civil and criminal fines. They then conclude that such limits are intended to apply to punitive damages in modern civil tort actions. This premise is highly questionable, based on a review of the history at the time of the Magna Carta, the English Bill of Rights, the Eighth Amendment, and modern caselaw.

There is little question that ameracements were fines payable to the King. They were not payable to private parties. Ameracements coexisted with civil damages. "The distinction between ameracements and damages is well known. The former were payable to the Crown after legal action or for an error or ineptitude which took place in its course; the latter represented the loss incurred by a litigant through an unlawful act. They were payable to [the private litigant]. . . ." 62 Selden Society, Introduction to the Curia Regis Rolls, 1199-1230 A.D. 463 (C.T. Flower ed. 1944) [hereinafter C.T. Flower].

Sums payable through ameracements were not remedies to settle disputes between private plaintiffs and private defendants. Private disputes that resulted in civil damages particularly pertaining to dis-seisin, were somewhat unusual in the thir-



teenth century, though there are numerous recorded cases. C.T. Flower, supra, at 473-479. When parties were aggrieved by serious misconduct, a punitive judgment could be imposed: "And so in a characteristically English fashion punishment was to be inflicted in the course of civil actions: it took the form of manyfold reparation, of penal and exemplary damages." 2 F. Pollock & F.W. Maitland, The History of English Law Before the Time of Edward I [1239-1307] 522 (2nd ed. 1911) (emphasis added). Similarly, civil damages could reflect a "moral" judgment pertaining to misconduct. C.T. Flower, supra, at 475. A separate system of civil justice that emerged later through the dominant writ of trespass and that was designed to provide money damages to aggrieved parties was in its embryonic stage in the thirteenth century. Pollock & Maitland, supra, at 523.

Many civil actions concluded with separate awards for civil damages to be paid to the private litigant and an amercement or court fee to be paid to the justice or court. C.T. Flower, supra, at 465 et seq.; A. Harding, A Social History of English Law 61 (1966). The sums payable for amercements were guided by Chapter 20 of the Magna Carta; in contrast, civil damages paid to the private litigant "were much less standardised." C.T. Flower, supra, at 473. Civil damages in these earliest of tort actions "vary widely; and then, as now, their assessment must have been difficult." C.T. Flower, supra, at 476.

Chapter 20 of the Magna Carta placed limits on the amercement or fining power of the King. Among other things, the clause requires proportionality and dictates that "the amercement should be in proportion to the wrong done; . . . this

meant the wrong done to the lord or the court, and not to the other party to litigation in that court."<sup>1</sup> 80 Selden Society, Novae Narrationes cci (S.E. Shanks ed. 1963) (emphasis added).<sup>2</sup> Thus, the abuse inherent in amercements related to extortive practices by the King. Such control was accomplished through the proportionality requirement and by assuring that a jury rendered a determination on the amount of an amercement, as opposed to

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<sup>1</sup>To the extent the clause imposed a requirement of proportionality, it did so by directing that the amercement be "in proportion to the wrong done," not in proportion to the civil damages that accompanied early legal proceedings.

<sup>2</sup>This concept is central to the case before the Court. It underscores the proper meaning of amercements or fees payable to the King. The source, Selden Society, Novae Narrationes, supra, at cci, indicates this interpretation derives from Natura Brevium and Fitzherbert, Grand Abridgement of the Laws of England (1514). These sources are based on original case material from Bracton's authoritative work on the thirteenth century. "[I]t is ultimately to Bracton and to Bracton alone that we must look for an account of this period [1216-1272]. . . ." 2 W. Holdsworth, A History of English Law 286-88 (1923).

a judge of the court of the King. The sole function of the court was to declare that an amercement or fine was due, at which point it became the obligation of the jury to fix the amount. W.-Walsh, A History of Anglo-American Law 309 (1932); 4 W. Blackstone, Commentaries \*372-3.

The desire to control excesses of the sovereign arose because the amercement "system" involved fines and taxes imposed by the executive for the purpose of generating revenue. Amercements could be imposed on an individual, or used as a tax generally, "laid upon the County, Hundred, or Wapentake as a whole. . . ." 2 Vinogradoff, Oxford Studies in Social and Legal History, Customary Rents 186 (1974). A great concern underlying the Magna Carta was that the Kings' bench could amerce an entire community. 2 F. Pollock & F.W. Maitland, The History of English Law Before the Time of Edward I 493 (2nd ed.

1923). "[T]he fines and amercements were another branch of the King's revenue. . . ." The Oxford English Dictionary, Vol. I, 279 (1971). The relationship to be confined, therefore, was between the King and the various communities, not, as the petitioners' argument implies, between two private persons involved in a legal dispute.

The barons who pressed the Magna Carta on the King did so because "he had been violating the law in his conduct towards them . . . [and] they had learned that they could not trust him. . . ." G. Adams & R. Schuyler, Constitutional History of England 128 (1935). The concern was that the King and his courts through the force of office would be able to implement a public law system, and particularly a taxation system, that could cripple the baronage. It was that sentiment that led to the adoption of Chapter

20 regarding amercements, and 473 years later led to the adoption of an excessive fines clause in the English Bill of Rights that was again designed to control the executive excesses of the King. 6 W. Holdsworth, A History of English Law 232 (1924).<sup>3</sup>

#### B. The Magna Carta Was a Public Law Document.

It is contrary to history to assert that the Magna Carta was designed to have

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<sup>3</sup>Even a full literal translation of the amercements clause suggests that it was never intended to apply to assessments or fines based on violent or outrageous behavior, i.e., the kind of misconduct that today gives rise to punitive damages. In dealing with the clause as it applied to rents and forfeitures, one scholar interprets it to require "a reasonable misericordia according to the character of the offense, unless the forfeiture pertain ad gladium (sic) nostrum." Properly translated, the exception refers to a savings clause in the 1261 Macclesfield charter in which "Pleas of the Sword," (ad gladium) or grave crimes, were subject to fines and punishment well beyond the standard amercement. 2 Vinogradoff, Oxford Studies in Social and Legal History, Customary Rents (by N. Neilson) 183 (1974). [Note: Translation assistance provided by Professor S.F.C. Milsom, Q.C., F.B.A., and Professor Victor Tunkel, The Selden Society, Queen Mary College, Faculty of Laws, London, England.]



an impact on the damage awards payable to private persons. The "Magna Carta was an instrument of public law; little place will be found in it for private law principles." Lobingier, The Laws of England in the Thirteenth Century With a New Interpretation of the Barons' Reply at Merton 4 (n.d.). William Holdsworth warned legal historians against such overextrapolation of the meaning of the Magna Carta: "Like all documents which have attained not merely fame but sanctity, it has become the source of dogmas and doctrines of which its framers never dreamt; and an attempt to ascertain the meaning which the men of 1215 attached to some of its more famous clauses, no doubt would, if it were a theological document, be denounced as blasphemous." 2 W. Holdsworth, A History of English Law 209 (1923).

This is not to suggest that the Magna Carta was inapplicable to private persons,

but rather to suggest that it was applicable to transactions between private persons and the King. Similarly, it is not suggested that excessive amercements were not a problem; indeed they were. Amercements were assessed as taxes for a series of real or imagined transgressions of the King's interests. These included "false verdicts, the variation of pleas or verdicts, contempt of court and some minor offenses, which can be brought together as breaches of etiquette." C.T. Flower, supra, at 469. In many cases, both plaintiff and defendant were amerced, highlighting the inapplicability of the amercements clause restraints to private civil actions. C. Kinnane, A First Book on Anglo-American Law 272 (2nd ed. 1952). The simple fact is that the Magna Carta did not address relations between and among private persons. For example, as to the nonperformance of contract or unlawful

debt, "the Charter laid down nothing." And as to most other matters, the Charter "only touched the fringes. . . ." J.C. Holt, Magna Carta 232 (1965).

From all this, several things are clear. First, a control on amercements was a control on the authority of the sovereign, not a dictate regarding private damages. Second, the drafters of the Magna Carta had tremendous faith in the jury and directed that juries determine amounts for amercements and damages, recognizing full well the lack of certainty in that process. Third, the Magna Carta did not apply to damages paid to private persons but applied exclusively to the activities of the King. It is no accident of history that the Magna Carta was written by barons who sought to control sovereign authority, that the English Bill of Rights was written by those who sought to control the "perversions of

judicial prerogatives of the Crown" by creating prohibitions on "excessive fines," 6 W. Holdsworth, A History of English Law 232 (1924), and that the Bill of Rights of the United States Constitution was written to address the concerns of antifederalists who feared the excesses of an overreaching and intrusive federal government. In sum, the historical antecedents leading to the English Bill of Rights and the Eighth Amendment excessive fines clause suggest exclusively a desire to control executive authority and in no way suggest a desire to control the ability of an individual state to implement a punitive damage system in cases between private persons.

**C. The Law Pertaining to Punitive Damages in Commonwealth Countries Is Not Constrained by the Magna Carta.**

In the last century, the policies underlying punitive damages have been debated openly in Great Britain. Neither

the Magna Carta nor the English Bill of Rights has played a role in this analysis.

In Great Britain, exemplary damages "are awarded to teach the defendant that 'tort does not pay' and to deter him and others from similar conduct in the future." Clerk & Lindsell, The Law of Torts 242-43 (15th ed. 1982). Punitive damages are provided "to punish the defendant in an exemplary manner, and vindicate the distinction between a willful and innocent wrongdoer." 2 J. Saunders, Words and Phrases Legally Defined 5 (1969).

In Rookes v. Barnard, [1964] A.C. 1129, [1964] 1 All E.R. 367, the House of Lords placed limits on punitive damages by confining the categories in which punitive damages may be awarded. Rookes permits punitive damages where there has been arbitrary or abusive behavior by a government servant, where a defendant has pro-

fited substantially by engaging in misconduct, or where a statute authorizes punitive damages. Rookes v. Barnard, supra, [1964] A.C. at 1226-27, 1 All E.R. at 410-11. These limitations, however, have had little effect on the ability of juries in Great Britain to award supplemental damages, since "aggravated damages" are available in most civil actions for tort, and can be given "to soothe the injured feelings of a plaintiff, . . . [for] insolence or arrogance" or similar reasons. G. Williams & B. Hepple, Foundations of the Law of Tort 69 (1976); see J. Fleming, The Law of Torts 584-85 (5th ed. 1977), in which the author notes the similarity between exemplary damages and aggravated damages.

The limitation in Rookes has been considered in the major common law jurisdictions that apply Magna Carta and English Bill of Rights principles, inclu-



ding Australia, Canada, Ireland, and New Zealand. Each country has rejected the Rookes limitations,<sup>4</sup> giving the doctrine of punitive damages a "wider interpretation." Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1264, n.23 (1976). Prior to Rookes v. Barnard, British courts considered punitive damages at great length and in detail. In each instance, punitive damages were found to be fundamental to the British legal system.<sup>5</sup> So deeply entrenched is the doctrine of punitive damages in Great Britain that Lord Denning

<sup>4</sup>Australia, Uren v. John Fairfax & Sons, [1967] A.L.R. 25; Canada, McElroy v. Cowper-Smith & Woodman, [1967] 62 D.L.R. (II) 65; McKinnon v. F.W. Woolworth Co., [1968] 70 D.L.R. (II) 280; Bahner v. Marwest Hotel Co., [1969] 6 D.L.R. (III) 22; New Zealand, Fogg v. McKnight, [1968] N.Z.L.R. 330.

<sup>5</sup>See Youssoupoff v. Metro-Goldwyn-Mayer Pictures Ltd., [1934] 50 T.L.R. 581, 582; Rook v. Fairrie, [1941] 1 K.B. 507, 516; Knuppfer v. London Express Newspapers Ltd., [1943] 1 K.B. 80, 85; Lewis v. Daily Telegraph, [1963] 1 Q.B. 340, 381; E. Hulton & Co. v. Jones, [1910] A.C. 20, 25.

refused to follow the limitations of Rookes v. Barnard in his decision to award punitive damages in Broome v. Cassell & Co., [1971] II Q.B. 364, 368-69. This refusal to follow Rookes was rebuked on appeal. Cassell & Co. v. Broome, [1972] A.C. 1027.

Without going further into the intricacies of British legal doctrine, it is clear that punitive or exemplary damages are alive and well in Commonwealth countries. The 1964 Rookes limitations are the result of the intrusive role played by the higher British courts in the affairs of inferior courts and have nothing to do with the constitutional or historical contentions of the appellant. In the absence of a federal system, it is not uncommon for the House of Lords to engage in a review of jury verdicts. In contrast, it would be most unusual for the United States Supreme Court to become involved in

a day-to-day assessment of jury verdicts in civil punitive damage cases, determined under state law, involving two private parties.

## II

### THE PROHIBITIONS OF THE EIGHTH AMENDMENT ARE APPLICABLE ONLY TO CRIMINAL SANCTIONS. PUNITIVE DAMAGES ARE NOT CRIMINAL SANCTIONS.

#### A. The History of the Excessive Fines Clause of the Eighth Amendment Establishes that the Framers Intended to Keep in Check the Power of the Sovereign to Impose Excessive Fines in Criminal Cases.

The history of the excessive fines clause in the English Bill of Rights is straightforward: the drafters were concerned with "[t]he recent perversions of the judicial prerogatives of the Crown." 6 W. Holdsworth, A History of English Law 232 (1924). Their concerns focused on the mode of criminal punishment, controlling excessive bail and fines, and placing controls on the use of criminal treason trials. Holdsworth, supra, at 233-34,

410-12. Justice Story's treatise on the U.S. Constitution demonstrates the effect of the British experience on the U.S. Bill of Rights: "It was, however, adopted as an admonition to all departments of the national governments, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts." 2 J. Story, Commentaries on the Constitution of the United States 623-24 (4th ed. 1873) (footnote omitted). The English Bill of Rights is the direct source of the Eighth Amendment.

It has been argued that the excessive fines clause of the Eighth Amendment applies to civil proceedings, notwithstanding the history of the English Bill of Rights. However, in Ingraham v. Wright, 430 U.S. 651, 665-66 (1977), this Court analyzed the history of the Eighth Amendment, paying particular attention to the question of whether it applied to

matters beyond criminal prosecutions. The case holds that the three clauses of the amendment were designed "to limit the power of those entrusted with the criminal-law function of government." 430 U.S. at 664. Making reference to an earlier draft of the Eighth Amendment that explicitly included a "criminal case limitation on the Eighth Amendment," this Court held:

[A]lthough the reference to 'criminal cases' was eliminated from the final draft, the preservation of a similar reference in the Preamble (footnote omitted) indicates that the deletion was without substantive significance. . . . [T]he principal concern of the American Framers appears to have been with the legislative definition of crimes and punishments. . . . But if the American provision was intended to restrain government more broadly than its English model, the subject to which it was intended to apply--the criminal process--was the same.

430 U.S. at 665-66. Quite obviously, the Eighth Amendment was read by this Court as applicable only to criminal cases.

The conclusions of this Court in

Ingraham are consistent with the historical perspective of the amendment.<sup>6</sup> It is difficult to identify any original source material devoted exclusively to the excessive fines clause, since most of the principals were arguing for an amendment to control criminal sanctions and thus did not address individually fines, bail, or punishment. Typical of this dialogue is the commentary of Brutus II (penname of Melanthon Smith, a New York State anti-federalist strategist), who wrote that adoption of the Bill of Rights was essential "for the security of life, in criminal prosecutions, . . . ." To accomplish this objective, Smith sponsored an amend-

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<sup>6</sup>See R. Perry & J. Cooper, Sources of Our Liberties, Documentary Origin of Individual Liberties in the United States Constitution and Bill of Rights 238 (1972); B. Schwartz, A Commentary on the Constitution of the United States (pt. 3) p. 754 (1968), discussing the Eighth Amendment prohibitions as a cure for problems relating to "monetary fines as penalties for criminal offenses."



ment that guaranteed that "excessive bail should not be required, nor excessive fines imposed."<sup>7</sup>

It is illogical to assert that a clause designed to control the criminal enforcement power of the federal government has an original meaning that allows it to be used to place controls on one state's implementation of its civil justice system. It is certainly understandable that parties confronted with civil fines or punitive damages would seek constitutional protection. However, civil sanctions are the province of the state courts and legislatures and are not matters for assessment under the Eighth

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<sup>7</sup>Brutus II, To the Citizens of the State of New York, New York Journal, November 1, 1787, reprinted in 13 The Documentary History of the Ratification of the Constitution, 1 Commentaries on the Constitution: Public and Private, 21 February to 7 November 1787, pp. 524, 527 (Kaminski & Saladino eds. 1981).

Amendment excessive fines clause.<sup>8</sup>

#### B. Punitive Damages Are Not Criminal Sanctions.

In Solem v. Helm, 463 U.S. 277 (1983), this Court held that the principle of proportionality should be applied to criminal sentences assessed under the Eighth Amendment. United States v. Ward, 448 U.S. 242 (1980), permits certain proceedings labeled "civil" to be analyzed as if they were "criminal" for purposes of Eighth Amendment review, raising two central questions for this case. First, are punitive damages criminal sanctions, thus activating the principle of proportionality? Second, should the Court find punitive damages are in the nature of criminal sanctions, does the Vermont

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<sup>8</sup>City of Scranton v. Peoples' Coal Co., 274 Pa. 63, 117 A. 673, 676 (1922); Dalton v. Bob Neill Pontiac, Inc., 476 F. Supp. 789, 797, n.13 (M.D.N.C. 1979); Zwick v. Freeman, 373 F.2d 110, 119 (2d Cir. 1967); United States v. Stangland, 242 F.2d 843, 848 (7th Cir. 1957).

scheme for imposing punitive damages pass constitutional muster? See Discussion, Part III, infra.

Punitive damages serve multiple purposes including punishment, a function also served by the criminal law. The mere fact that one of the purposes underlying punitive damages is similar to one of the purposes underlying criminal law does not change the stark legal fact that punitive damages are recognized to "have long been a part of traditional state tort law." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984).

Implicitly, Silkwood allows for the recognition of different protective regimes within our legal system. In limited circumstances, punitive damages are available to private persons who have been wronged by gross misconduct. Civil fines address governmental needs, ensuring the implementation of legislatively-mandated

behavioral norms,<sup>9</sup> and are subject to scrutiny by the federal courts, while punitive damages are subject to scrutiny pursuant to state tort law principles. 464 U.S. at 257.

To move punitive damages into the domain of civil fines and then move civil fines into the domain of criminal fines would require large jurisprudential leaps, ignoring whole blocks of established precedent. Recently the Court made quite a clear distinction between fines "paid to the state as an abstract and impersonal entity, often calculated without regard to the harm the defendant has caused . . . ," Kelly v. Robinson, 479 U.S. 36, 49 n.10 (1986), and punitive damages, referred to as a system of "wholly private penalties." 479 U.S. 36, 50 n.13. The notion that

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<sup>9</sup>42 U.S.C. § 2011 et seq. (1976 ed. and Supp. V) provides the Nuclear Regulatory Commission with the ability to seek civil fines for noncompliance with various rules pertinent in the Silkwood case.

punitive damages are wholly different from civil or criminal fines is common to our jurisprudence.<sup>10</sup>

In San Francisco Civil Service Ass'n v. Superior Court of Marin County, 16 Cal. 3d 46, 127 Cal. Rptr. 131, 544 P.2d 1331 (1976), the court confronted the question of whether civil fines for raw sewage discharge were similar in character to punitive damages. The court held that a civil fine could "be imposed upon a public entity because the monies thereby collected civilly are not punitive damages. . . ." 16 Cal. 3d at 49, 127 Cal. Rptr. at 134, 544 P.2d 1334. This position is reflected in the Restatement (Second) of Torts: "Punitive damages are to be dis-

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<sup>10</sup>In Palmer v. A.H. Robins, 684 P.2d 187, 217 (Colo. 1984), the Colorado Supreme Court was asked to analogize a punitive damage system to a fine system without limits. The court found the excessive fines clause "has no application to a civil proceeding involving a punitive damage claim ancillary to a civil cause of action."

tinguished from qui tam awards and civil penalties or forfeitures." § 908 Restatement (Second) of Torts, comment a (1977).

A transformation of punitive damages from a civil to criminal sanction can occur if it is clear that the legislative sanction was written with the purpose of establishing a penalizing mechanism and is overtly punitive in purpose and effect based on the precedent and history of the sanction. United States v. Ward, 448 U.S. 242, 248-49 (1980). To succeed in this metamorphic venture, the appellant must establish by "only the clearest proof" that the state legislature had engaged in a drastic form of mislabeling. Cf. Fleming v. Nestor, 363 U.S. 603, 617 (1960).

It is hard to see how punitive damages can be considered criminal, based on the above proof standard, particularly since this Court has recently held that



they are "part of traditional state tort law" and that they are not civil fines. Silkwood, 464 U.S. at 255. They are not legislatively-created sanctions. They are the consequence of state common law. They derived from the system of private wrongs, not public wrongs. There is not a single instance in all of American jurisprudence in which a court has accepted the proposition that a state common law tort remedy (not a legislative sanction) could somehow be recharacterized as a criminal sanction. To blur the distinction between civil private redress and criminal sanction would throw our jurisprudence back to the thirteenth century, to a time where the distinctions between civil law and criminal law, public fines and private remedies, were difficult to delineate.<sup>11</sup>

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<sup>11</sup>Normally, to be covered under the excessive fines clause, the fine must be "money exacted from a person guilty of a crime as pecuniary punishment." South Carolina State Highway Dept. v. (Cont'd)

It has been argued in prior cases that punitive damages are similar to criminal sanctions and that their imposition would offend double jeopardy prohibitions, if there is a state criminal prosecution addressing the same misconduct. The profound distinction between private civil punitive damages and criminal enforcement, however, prompts many courts to take the position that "when exemplary damages are justified, they should not be withheld merely because a civil or criminal penalty has been or may be imposed." Security Aluminum Window Mfg. Corp. v. Lehman Assoc., 108 N.J. Super. 137, 260 A.2d 248, 254 (1970). A

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Southern Ry., 239 S.C. 227, 122 S.E.2d 422, 424 (1961). From the broader perspective of a state "excessive fines" clause, the fine must be a "penalty exacted by the state for some criminal offense." State v. State Board of Equalization, 133 Mont. 43, 319 P.2d 1061, 1063 (1958). Even so, it has been suggested that if a court were to characterize punitive damages as a civil penalty, "the Eighth Amendment argument is inapposite." United States v. Stangland, 242 F.2d 843, 848 (7th Cir. 1957).

number of jurisdictions allow juries to consider the fact of criminal prosecution in assessing the amount of punitive damages, e.g., Hanover Insurance v. Hayward, 464 A.2d 156, 159 (Me. 1983).

As a matter of policy and practice, there are significant differences between the objectives underlying criminal law enforcement and civil punitive damages.<sup>12</sup> First, criminal enforcement is intended to punish those who have violated rules pertinent to the public at large. Punitive damages redress private violations. Second, criminal enforcement holds the possibility of the denial of liberty interests, a matter that cannot be readily equated with any form of civil sanction. Third, punitive damages accommodate a retributive interest unmet in criminal

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<sup>12</sup>These are discussed in greater detail in Part III. However, these "beneficial" aspects of punitive damages highlight the difference between punitive damages and criminal enforcement.

enforcement. Unlike the criminal justice system, where fairness concerns make it difficult for certain types of victims even to be heard in court, the civil punitive damage system provides victims with recourse based on the nature of the wrongful act occasioned upon them. Booth v. Maryland, 482 U.S. 496 (1987).

#### C. Punitive Damages Are Part of Our Common Law Heritage.

In Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851), this Court found that punitive damages are proper, so much so that argument as to their validity was not tolerated. Further, the Day Court suggested that punitive damages were not "criminal in character." Id. In Missouri Pacific Ry. v. Humes, 115 U.S. 512, 521 (1885), this Court approved the use of punitive damages to "blend together the interests of society and the aggrieved individual." The Court went on to note that such awards were a matter for the

jury and were not bound by "very definite rules," yet "the wisdom of the practice" was not debatable. Quite clearly, the nineteenth century view of punitive damages was that the doctrine was "too well settled now to be shaken, that exemplary damages may in certain cases be assessed." Milwaukee & St. Paul Ry. v. Arms, 91 U.S. 489, 492 (1875). State courts reflect the same perspective, finding punitive damages appropriate based on the manner in which an injury was inflicted "whether by negligence, wantonness, or with or without malice." Fleet & Semple v. Hollenkemp, 52 Ky. (13 B. Mon. 219) 175, 180 (1852); Merrells v. The Tariff Mfg. Co., 10 Conn. 388 (1835); Linsley v. Bushnell, 15 Conn. 225 (1842).

This Court considered the constitutionality of punitive damages in Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26, 36 (1889), holding: "The imposi-

tion of punitive or exemplary damages . . . cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law." These holdings reflect the history of punitive damages. Looking to the legal systems in the United States, Great Britain, and even to Roman law, it is evident that punitive damages are a fundamental part of our jurisprudence.<sup>11</sup>

More recently, this Court allowed the use of punitive damages against law enforcement officers even though such damages might have a chilling or intimidating effect on certain law enforcement functions. In Smith v. Wade, 461 U.S. 30 (1983), this Court determined that punitive damages could be awarded by a jury in

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<sup>11</sup>D. Pugsley, The Roman Law of Property and Obligations 31 (1972); B. Nicholas, Roman Law 210 (1962); Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1258, 1262, n.17 (1976); The Vitality of the Doctrine of Punitive Damages in Maine, 35 Me. L. Rev. 447, 451 (1983).



actions brought pursuant to 42 U.S.C. § 1983 (1982). The opinion does not address the question of damage limits, though it does confirm the validity of punitive damages as a deterrent to misconduct. 461 U.S. at 36-37, n.5.

An equally difficult but substantively different application of punitive damages occurs in the area of defamation. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court considered the chilling force of punitive damages in defamation cases, and determined that such awards were proper so long as the state applied the conventional malice test used in this area even when dealing with private plaintiffs. This standard was modified in Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), permitting punitive damages without a finding of actual malice so long as the speech does not involve matters of public con-

cern. Like the case before the Court today, Greenmoss is a Vermont case in which this Court upheld the state's punitive damage system. Greenmoss Builders v. Dun & Bradstreet, 143 Vt. 66, 77, 461 A.2d 414, 419 (1983), aff'd, 472 U.S. 749 (1985).

Both Smith v. Wade and Gertz permit an endorsement of punitive damages in extraordinarily complex policy settings, and both cases maintain punitive damages without damage proportionality rules even though there are powerful contrary federal policy considerations. Given that history, one is hard pressed to see why punitive damages ought to be prohibited or modified for a state business tort where the federal interest implicated, competition, can only be enhanced by punishing intentional predatory acts.

## III

**PUNITIVE DAMAGES PLAY A VITAL ROLE  
IN THE AMERICAN CIVIL TORT SYSTEM. A  
DECISION CURTAILING PUNITIVE DAMAGES  
WOULD HAVE A SEVERE AND ADVERSE EFFECT  
ON THE AMERICAN CONSUMER.**

Punitive damages are a civil remedy available to private parties and are not the proper subject for review under the Eighth Amendment excessive fines clause. Outside of apparent constitutional interests, such as implementation of federal civil rights laws or First Amendment matters, punitive damages are best left to the decisionmaking of each individual state. However, should this Court determine that a substantive review of punitive damages is in order, then the following concerns become relevant.

**A. A Fixed Limit or Preestablished Ratio for Punitive Damages Would Frustrate the Purposes Underlying Punitive Damages.**

A decision that compels the states to establish fixed ratios or clearly-delineated proportions in punitive damages

would allow business interests to calculate easily the proper sum to be set aside to accommodate judgments. This would have a disastrous effect on the deterrent value of punitive damages. "Conscious wrongdoers must know they cannot estimate the cost of their misdeeds by coldly calculating the number of dead or injured and their resulting limited compensatory expenses. They must know that their financial existence may be threatened by the evil they contemplate." Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797, 833 (1987).

The lack of preestablished ratios has been considered by the courts in the past. In many cases courts favor an individualized punitive damage system not bound by mathematical equations. "The admonitory function of punitive damages does not lend

itself to formulation. . . . The refusal to specify a ratio is due to the need to individualize punitive damage verdicts. One must look to behavior, not to results, to determine the need to admonish and . . . the amount which must be awarded. . . ." Campus Sweater & Sportswear Co. v. M.V. Kahn Construction Co., 515 F. Supp. 64, 106 (D.S.C. 1979), aff'd, 644 F.2d 877 (2d Cir. 1981).<sup>12</sup> Other courts<sup>13</sup> have struggled to find a proper calculation mechanism but have come up empty handed:

Frankly, we are unable to find that formula. Instead of making a mathematical breakthrough we discovered what everyone probably already knows: the formula does not exist. And, we have concluded, that is properly so.

<sup>12</sup>See Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1180-81, n.9 (1931), rejecting proportional ratios as "arbitrary"; Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. 1258, 1316 (1976), rejecting ratios due to their failure to take into account appropriate damage factors.

<sup>13</sup>Linsley v. Bushnell, 15 Conn. 225, 235 (1842), "there is no rule of damages fixed by law" to accommodate punitive damages.

Although we may now live in a highly computerized society, it is important to recognize that the justice system need not and should not mirror a mechanistic view of life. . . . Accordingly, we examine the usual factors recited by appellate courts when reviewing punitive damage awards, applying those factors in the customary manner to reach what we believe is a decision consistent with precedent.

Devlin v. Kearney Mesa AMC/Jeep Renault, 155 Cal. App. 3d 381, 202 Cal. Rptr. 204, 209 (4th Dist. 1984).

Vermont, like many states, imposes no specific formula for punitive damages:

Punitive or exemplary damages are not recoverable as a matter of right. From their nature, they cannot be measured by any precise rules but are awarded in the discretion of the jury after consideration of their nature and extent of the wrong and the intent with which it was committed.

Pezzano v. Bonneau, 133 Vt. 88, 89, 329 A.2d 659, 660 (1974).<sup>14</sup>

<sup>14</sup>See Rogers v. Bigelow, 90 Vt. 41, 49, 96 A. 417 (1916); see also Malco v. Midwest Aluminum Sales, 14 Wis.2d 57, 109 N.W.2d 516 (1961); Foster v. Floyd, 276 Ala. 428, 163 So. 2d 213 (1964); Note, Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose, 9 Pac. (Cont'd)



Although this Court has not addressed the matter specifically, it has suggested that a plaintiff's entitlement to the "recovery of uncertain damages" is not flawed constitutionally, and that though defendants are entitled to certainty in ascertaining what conduct is wrong, they are not entitled to certainty "in respect to [the] . . . amount" of damages. Story Parchment v. Patterson Parchment Paper, 282 U.S. 555, 562 (1930). Recently, this Court characterized punitive damages as a "legal remedy that is not a fixed fine." Tull v. United States, 481 U.S. 412, 423 n.7 (1987). Tull follows well established precedent that defendants have no particular entitlement to a fixed maximum in cases where punishment is in the form of a

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L.J. 823, 852 (1979); Borowsky, Punitive Damages in California: The Integrity of Jury Verdicts, 17 U.S.F. L. Rev. 147, 164-65 (1983), condemning the reasonable relation rule as a decisional pretext; Restatement (Second) of Torts § 908, comment c (1977), permitting substantial punitive damages where actual damages are nominal.

fine. Standard Oil Co. of Indiana v. Missouri, 224 U.S. 270, 286 (1911) (applying this principle in a quo warranto proceeding). Accordingly, the lack of a fixed limit on a fine does not present any constitutional infirmity.

If the essence of the petitioners' contention is that a punitive damage award without a clear limitation is unconstitutional, the overwhelming body of authority rejects that proposition. A fixed ratio or set sum creates the very real possibility that punitive damages will be awarded irrationally, since the amount of compensatory damages, the likely multiplier, bears little relation to the degree of culpability of the actor.<sup>15</sup>

In this case, the petitioner suggests

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<sup>15</sup>A ratio rule "undermines the deterrent effect of punitive damages by stressing the actual resulting harm rather than the social undesirability of the defendant's conduct." Comment, Punitive Damages: An Appeal for Deterrence, 61 Neb. L. Rev. 651, 676 (1982).

that the treble damage standard for anti-trust injury is a perfectly appropriate multiplier, if punitive damages are assessed in the business tort, intentional interference with contract.<sup>16</sup> The predatory pricing behavior underlying the tort is also subject to scrutiny under the antitrust laws and can be the basis of a treble damage action. 15 U.S.C.A. § 4. Where, as here, a plaintiff is the victim of intentional interference with contract achieved through predatory practices, the plaintiff may elect to have damages assessed under either the antitrust laws or state tort law. Hansen Packing v. Armour, 16 F. Supp. 784, 788 (S.D.N.Y. 1936); Arnott v. American Oil, 609 F.2d 873, 878 (8th Cir. 1979); MacDonald v. Johnson & Johnson, 722 F.2d 1370, 1381

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<sup>16</sup>Section 766 of the Restatement (Second) of Torts regarding intentional interference is adopted in Vermont, Williams v. Chittenden Trust, 145 Vt. 76, 484 A.2d 911 (1984).

(8th Cir. 1984). Because the underlying behavior is the same, it is argued that the range of remedies available to plaintiffs for an antitrust injury (single or treble damages) and for a business tort (compensatory and where appropriate punitive damages) should be identical. This is a flawed argument based on false analogy, devoid of an appreciation of the differences between statutory and common law remedies.

As a statutory cause of action, a treble damage claim recognizes that private persons can be harmed by conduct that offends a set of rules designed to limit predatory behavior in the marketplace. Although the legislature created a treble damage litigation process that allowed private party recovery, there is no question that the basic interest protected is not injured competitor, but rather competition. Public or private prosecution of

violations of the antitrust laws protects the public interest in competition. Brunswick v. Pueblo Bowl-O-Matic, 429 U.S. 477, 488 (1977); Cargill v. Montfort of Colo., 479 U.S. 104, 110 (1987); Brown Shoe v. United States, 370 U.S. 294, 320 (1962). This differs sharply from the business tort model that protects the individual from intentional wrongful behavior.<sup>17</sup>

Although there may be controversy regarding the existence or long term effect of predatory pricing (Williamson, Delin-eating Antitrust, 76 Geo. L.J. 271 (1987)), there is no question that the antitrust debate is centered fully on the public questions of market effect. Accordingly, the sanctions the legislature imposes are in the nature of a civil fine

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<sup>17</sup>"Courts must be circumspect in converting ordinary business torts into violations of the antitrust laws." Merkle Press v. Merkle, 519 F. Supp. 50, 54 (D. Md. 1981).

on which a specific limit is imposed, consistent with nearly all legislative monetary sanctions. In contrast, a judicial directive limiting punitive damages in a private civil tort action, without any constitutional basis, would be an unprecedented and crude intrusion on the right of the state, through the jury system, to address private wrongs.

**B. Punitive Damage Awards Are Rare; Neither Their Size Nor Frequency Justifies Modification of the Process of Awarding Punitive Damages**

It has been argued that the sole function of punitive damages is punishment and deterrence. However, a careful inquiry into the field of punitive damages reveals that they serve multiple purposes. There is little question that punitive damages provide resources to an aggrieved plaintiff who, through no fault of his or her own, has been thrust into an abnormal risk category.

Individuals who suffer at the hands



of others whose behavior is sufficiently bad to be characterized as intentional or wanton misconduct are in no way winners of some bizarre lottery. The destruction of family life, the trauma of protracted litigation, the displacement of emotional equilibrium, and various costs<sup>18</sup> pertaining to pursuing legal claims can be addressed by a punitive damage award. Owen, supra, at 1296-98.

The notion that plaintiffs receive resources beyond compensation when their

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<sup>18</sup>In a few states punitive damages have been permitted explicitly for the purpose of assisting with attorneys fees so long as they do not exceed two times compensatory damages. The general rule in that state is that punitive damages are "essentially compensatory, not punitive. . . ." Lanese v. Carlson, 32 Conn. Supp. 163, 344 A.2d 361, 364 (1975); Doroszka v. Lavine, 111 Conn. 575, 578, 150 A. 692 (1930). Other jurisdictions allow punitive damages for "inconvenience, reasonable attorneys fees, and other losses too remote to be considered under actual damages." Pan Am Petroleum v. Hardy, 370 S.W.2d 904, 908 (Tex. Civ. App. 1963). Beyond deterrence and punishment, Mississippi recognizes that punitive damage awards encourage private persons to bring wrongdoers before the court. Snowden v. Osborne, 269 So. 2d 858 (Miss. 1972).

injuries are the result of egregious misconduct is rarely addressed in practical terms. Instead, the public is exposed to an unsubstantiated and hysterical dialogue surrounding unjust enrichment.<sup>19</sup> It is time to be more forthright.<sup>20</sup>

The simple fact is that punitive damages are rare. Such awards are concentrated in very few causes of action.

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<sup>19</sup>To be sure, many argue that direct payment to plaintiff is particularly troubling due to what they see as the "tort crisis." The best thinking in the area is that whatever problems exist in the tort field, punitive damages play no substantial role. Landes & Posner, New Light on Punitive Damages, 33 Reg. October 1986; Burrow & Collins, Insurance Crisis--Texas Style: The Case for Insurance Reform, 18 St. Mary's L.J. 759, 763-65 (1987); Kindregan & Schwartz, The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Tort Reform, 18 St. Mary's L.J. 673, 695 (1987).

<sup>20</sup>A few states are more straightforward in discussing punitive damages; Hicks v. Herring, 246 S.C. 429, 144 S.E.2d 151, 155 (1965), allows punitive damages to vindicate a private right. Jolley v. Puregro Co., 94 Idaho 702, 496 P.2d 939, 947 (1972), permits punitive damages for "rectification of wrongs"; Oppenhuizen v. Wennersten, 2 Mich. App. 288, 139 N.W.2d 765 (1965), permits punitive damages to address embarrassment.

News accounts of seemingly large punitive damage awards in unusual cases have dominated the public debate, serving as a substitute for any comprehensive review of civil litigation. In the most complete study to date examining trial court decisions from over thirty jurisdictions in ten states from 1981-1985, punitive damages were not routinely awarded. Daniels, Punitive Damages: Storm on the Horizon?, Preliminary Report of the Punitive Damages Project Study, Am. Bar Found. Fellows Seminar, ABA Midyear Meeting, Baltimore, Md. (February 8, 1986).

The study found that punitive damage awards in cases where plaintiff won a money judgment ranged from 0.0. percent of all reported verdicts in four sites to a high of 21.6 percent in Cobb County, Georgia. For two-thirds of the surveyed sites, the percentage of reported verdicts in which plaintiff won money was less than

ten percent. Additionally, this report found that in the three largest cities in the United States, punitive damage awards were even less frequent. In New York City, only 1.6 percent of awards included punitives, 2.2 percent in Cook County, Illinois (which includes Chicago), and 8.6 percent in Los Angeles County, California. Daniels, supra at 11.

Similarly, in another study tracing reported cases through federal courts from 1982 to November of 1984, punitive damages were found to be exceedingly rare, especially upon conclusion of the appellate process. Only four punitive damage awards were upheld out of 172 cases. See Landes & Posner, supra, note 19.

Moreover, punitive damage awards, though rare, appear to be clustered in cases involving intentional torts, not products liability or medical malpractice. Of the 359 product liability cases in the

Landes-Posner sample, punitives were allowed in only two percent of the cases. This conclusion is also supported by an intensive Rand Study which evaluated civil jury trials in San Francisco, California, and Cook County, Illinois, between 1960-1984. Peterson, Punitive Damages: Preliminary Findings, The Rand Corporation, Institute for Civil Justice (1985). In this 24-year period, Rand found only eight awards of punitive damages in product liability cases.

The monetary judgments which include punitive damage awards tend to be for causes of action involving personal violence, fraud, false arrest, and insurance bad faith. Daniels, supra at 14; Landes & Posner, supra at 34. It should not be surprising that these intentional torts may include a punitive award, since the underlying basis for these causes of action includes some form of malice or know-

ing, reckless disregard--the same elements necessary in most states to make a case for punitive damages.

Critics of punitive damage awards distort the landscape of litigation through the use of numerical averages. For example, in the Rand Cook County study, the average award was \$137,350, but 87.7 percent of the cases had awards lower than the average, with a median of \$8,800. Medians are the appropriate measure since they reflect the typical award or the dollar amount for the case at the 50th percentile when awards are listed from lowest to highest in ascending order. Daniels, supra at 13. They show what juries are likely to do, and what they do most often. Kimmelman, Trends in Product Liability Awards in the Era of Strict Liability Cost Effective Improvements in Product Safety and Quality, Tort and Ins. Practice Section Comm. on Prod. Gen. Liab.



and Consumer Law of Am. Bar Ass'n., at 31 (August 8, 1988).

The incidence and magnitude of punitive damage awards have been exaggerated to fuel the flames of tort reform efforts, such as the case at bar. The available data, notwithstanding anecdotal evidence reported in popular news accounts, strongly argues against this court disturbing the judgment of the court below.

It is argued regularly that compensatory damages are sufficient to cover the needs of injured persons and to provide sufficient deterrence to future misconduct.<sup>21</sup> Such arguments are devoid of empirical support.<sup>22</sup> Many cases where

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<sup>21</sup>It is also the case that many of the legal mechanisms designed to address corporate misconduct have not lived up to their promise. Schwartz & Adler, Product Recalls: A Remedy in Need of Repair, 34 Case W. Res. 401 (1984).

<sup>22</sup>Walker v. Sheldon, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499 (1961); Campus Sweater & Sportswear Company v. M.B. Kahn, 515 F. Supp. 64, 104-05 (D.S.C. 1979), holding that punitive damages deter (Cont'd)

punitive damages are awarded reflect a defendant's pattern of misconduct, repeated over a period of years, interspersed with various compensatory damage awards. Compensatory awards have not deterred the defendants, prompting the Supreme Court of Minnesota to conclude that punitive damages are particularly effective in preventing repetitive forms of misconduct. Gryc v. Dayton-Hudson, 297 N.W.2d 727 (Minn.), cert. denied, 449 U.S. 921 (1980).

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manufacturers from misconduct, encourage the production of safer products, and "serve as a type of private revenge which is carried out in the courts rather than through duels or in back alleys." The court held further "there is no exact monetary standard which can be used as a measure. . . . There is no formula for punitives as the amount to be awarded is particularly within the judgment and discretion of the jury, subject to the supervisory powers of the trial judge over jury verdicts. . . . The main things to be considered are the character of the tort committed, the punishment which should be meted out therefore, and the ability of the wrongdoer to pay." 515 F. Supp. at 105-06.

**C. The System Mandating Jury Determination of Punitive Damages, Coupled With Judicial Review, Is Proper and Sufficient to Assure a Just Outcome.**

Giving juries decisionmaking authority in the punitive damage area based on carefully-evolved state standards conforms with a uniformly-held perception that juries are our best guard against misuse of power. Taylor v. Louisiana, 419 U.S. 522, 530 (1975). We trust juries to demonstrate conscience, allowing them to assess community standards and make highly complicated decisions. Duncan v. Louisiana, 391 U.S. 145, 155-56, reh'g denied, 392 U.S. 947 (1968). Since this Court is willing to allow juries to decide matters of life and death, they should be trusted "to make a fair assessment of punitive damages in a civil tort case." Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797, 824 (1987).

Implicit in the petitioners' challenge is the assertion that juries will, somehow, make inaccurate or unfair determinations for punitive damages. At least three times in the recent past this Court remarked on the capacity of juries to assess punitive damages, not questioning the competence of the citizenry to make intelligent and fair judgments.<sup>23</sup> The confidence of this Court in the ability of juries to make intelligent judgments is reflected at the state level.<sup>24</sup>

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<sup>23</sup>City of Newport v. Fact Concerts, 453 U.S. 247, 270 (1981); Electrical Workers v. Foust, 442 U.S. 42, 50-51 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974).

<sup>24</sup>See Brink's v. City of New York, 546 F. Supp. 403, 413 (S.D.N.Y. 1982), aff'd, 717 F.2d 700 (2d Cir. 1983), holding that for punitive damages the "jury functions in a quasi-judicial capacity and is vested with broad discretion. . . . The court may intervene and set aside a verdict when the amount of the award is so excessive that it shocks the judicial conscience or it appears that it is result of passion and prejudice"; Gulf Atlantic Life Insurance Co. v. Barnes, 405 So. 2d 916, 925 (Ala. 1981), holding "the amount of damages is left largely to the discretion of the jury; however, this discretion is not absolute"; (Cont'd)

In Vermont, "punitive damage awards are largely within the jury's discretion" although such awards can be set aside if they are grossly or manifestly excessive. Glidden v. Skinner, 142 Vt. 644, 648, 458 A.2d 1142, 1145 (1983). Punitive damages are awarded only where a party has acted with actual malice. Appropriate Technology v. Palma, 146 Vt. 643, 647, 508 A.2d 724, 726 (1986). If this court evaluates the Vermont system of review of punitive damages, it is inconceivable that the system will be found wanting.

Vermont caselaw demonstrates the presence of meaningful review in the specific type of case before this Court. In Chittenden Trust v. Marshall, 146 Vt. 543, 550-51 n.9, 507 A.2d 965, 970-71 n.9

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Tri-Tron Int'l v. Velto, 525 F.2d 432, 438 (9th Cir. 1975), holding: "courts will not interfere with the award unless it appears to have been influenced by passion, prejudice, or some improper motive, or unless it is outrageously disproportionate either to the wrong, or the situation or circumstance of the parties."

(1986), the Supreme Court of Vermont reviewed carefully a business tort (in a debt collection case) and found the "jury's award on this claim . . . clearly excessive. . . ." The court also condemned the lower court for failing to give precise instructions regarding the different law of damages to be applied to separate causes of action. See Hershenson v. Lake Champlain Motors, 139 Vt. 219, 222, 424 A.2d 1075, 1077 (1981); Appropriate Technology v. Palma, 146 Vt. 643, 648, 508 A.2d 724, 727 (1986); and Moses v. Gagne, 140 Vt. 43, 48, 433 A.2d 315, 318 (1981), rejecting compensatory and punitive damage awards on substantive grounds. Along similar lines, Vermont does not allow punitives for egregious misconduct in the absence of compensatory damages. Allard v. Ford Motor Credit Co., 139 Vt. 162, 164, 422 A.2d 940, 942 (1980); Appeal of Gadhue, 149 Vt. 322,



326-27, 544 A.2d 1151, 1153 (1987).

The picture that emerges shows a state involved in serious, objective judicial review based on commonly understood standards.<sup>25</sup>

### CONCLUSION

It has been demonstrated that neither history, precedent, nor policy support a reversal of the Second Circuit's application of Vermont law. There is no generic principle of proportionality commanding fixed ratios or preestablished limits in punitive damage cases, and there is no constitutional basis to review punitive damages under the Eighth Amendment.

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<sup>25</sup>Powers v. Judd, 1988 Vt. Lexis No. 86-290, \_\_\_ Vt. \_\_\_, \_\_\_ A.2d \_\_\_ 153 (July 22, 1988); Appropriate Technology v. Palma, 146 Vt. 643, 647, 508 A.2d 724, 726 (1986); Crabbe v. Veve Association, 150 Vt. \_\_\_, 549 A.2d 1045 (1988). For comparison, see Commodore Corp. v. Bailey, 393 So. 2d 467 (Miss. 1981).

Finally, a close look at punitive damages reveals a useful, fair, and beneficial system.

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**AMICUS CURIAE**

**BRIEF**

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No. 88-556

Supreme Court, U.S.

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CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. AND  
BROWNING-FERRIS INDUSTRIES, INC.

v. *Petitioners,*

KELCO DISPOSAL, INC., AND JOSEPH KELLY,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

**No. 88-556**

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC. AND  
BROWNING-FERRIS INDUSTRIES, INC.

*Petitioners,*

v.

KELCO DISPOSAL, INC., AND JOSEPH KELLY,

*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

**BRIEF OF AMICUS CURIAE  
ASSOCIATION OF TRIAL LAWYERS OF AMERICA  
IN SUPPORT OF RESPONDENTS**

**INTEREST OF AMICUS CURIAE**

The Association of Trial Lawyers of America [ATLA] respectfully submits this brief as amicus curiae in support of respondents in this case. Letters of consent by the parties have been filed with the clerk.

ATLA is a voluntary association of about 60,000 trial attorneys around the country. ATLA members primarily represent victims: Those who have suffered economic harm, loss of civil rights, or personal injury. Often the wrongdoers are individuals. The reality of modern life, however, is that the deliberate decisions of large corporate entities frequently pose the most severe and widespread threats to the rights, health and property of us all.

States have found that the common law tort remedy of punitive damages provides a powerful deterrent to unsafe practice and corporate bad faith. Amicus is concerned that predictable limits on the amounts of such awards will dilute their effectiveness. By treating anticipated damages as a cost of doing business, corporations could, in effect, purchase a license to do evil.

### SUMMARY OF ARGUMENT

The central issue in this case is fairly narrow and easily stated: Might an award of punitive damages in a private civil action which is not excessive under the common law of torts nevertheless be excessive under the United States Constitution. Amicus argues that the *amount* of a jury's punitive damages verdict simply does not present a federal constitutional question. This Court has itself applied the common-law standards, including the factor of the defendant's wealth, to uphold punitive damage verdicts. The Eighth Amendment Excessive Fines Clause does not impose tighter limits on such awards. The language and history of the amendment plainly demonstrate that it does not apply to civil jury verdicts. Punitive damages are purely civil penalties. Though their purpose is to punish and deter, they are not "criminal" in the constitutional sense. Defendants facing such claims are not entitled to the constitutional safeguards afforded criminal defendants.

Nor does public policy support intervention by this Court into the workings of state tort law. Large punitive damage verdicts are relatively infrequent. Allegations of a "crisis" of escalating verdicts threatening American business are grossly exaggerated. The common-law controls applied by state courts protect defendants from unduly burdensome verdicts. Moreover, since punitive damages are imposed only for egregious misconduct, defendants can easily avoid such liability.

While the *procedures* for imposing punitive damages do implicate due process considerations, the safeguards required by the Due Process Clause in civil actions are minimal. The manner in which punitive damages are awarded is not arbitrary or standardless. Every state which authorizes punitive damages also requires that juries be given specific guidelines for fixing the amount of such damages. In addition, courts scrutinize such verdicts to avoid harsh or unfair penalties. These safeguards are far more protective of defendants' rights than the minimum demanded by due process.

Finally, public policy argues against constitutionalizing the law of torts. The threat of a punitive verdict that corporate planners cannot calculate with precision is a powerful incentive for corporations to avoid deliberate or reckless misconduct in violation of the state's substantive law. To impose limits on punitive damages would allow corporations to treat them as another cost of doing business. Companies could, in effect, purchase a license to do evil. In this manner, constitutional limits on the amounts of punitive damage verdicts would undermine the state's ability to achieve the goals of its own substantive law.

### ARGUMENT

#### I. THE UNITED STATES CONSTITUTION DOES NOT LIMIT THE AMOUNT OF PUNITIVE DAMAGE AWARDS IN CIVIL SUITS.

A jury found Petitioners guilty of tortious interference with business relationships, assessing punitive damages of \$6 million. The Second Circuit held that the award was not excessive under common-law rules.

Petitioners and supporting *Amici* expend considerable energy propounding their views on a variety of issues that are not before this Court. The wisdom of state substantive tort law, notably products liability law, is not at issue here. Nor is the question of whether punitive damages should be available



in appropriate cases. The sole question before this Court is whether a punitive damage verdict in a civil action that is not excessive under the standards of the common law might be excessive under a more stringent standard imposed by the Constitution.

**A. THE CONSTITUTION DOES NOT REQUIRE A JURY TO USE A SINGLE FORMULA OR FACTOR IN FIXING THE AMOUNT OF PUNITIVE DAMAGES.**

As early as *Day v. Woodworth*, 54 U.S.(13 How.) 363, 371 (1851), this Court recognized that punitive damages were "a well established principle of the common law." The most widely accepted formulation of that principle is:

Punitive damages may be awarded for conduct that is outrageous, because of defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of defendant's act, the nature and extent of the harm to the plaintiff that defendant caused or intended to cause, and the wealth of the defendant.

Restatement (Second) of Torts § 908(2) (1977). Nearly every state permits punitive damage verdicts to enforce the substantive tort law. See K. Redden, *Punitive Damages* § 5.2 (1980). Similarly, this Court has approved punitive damage awards to enforce federal civil rights. *Smith v. Wade*, 461 U.S. 30 (1983). The Court has consistently adhered to its position that "the Constitution presents no general bar to the assessment of punitive damages in a civil case." *Curtis Pub. Co. v. Butts*, 388 U.S. 139, 159 (1967).

Likewise, this Court has found no constitutional limit on the amounts of punitive damage verdicts. The Court has upheld awards far larger than that at issue here. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), upholding a \$10 million punitive damage verdict, noting that punitive

damages "have long been a part of traditional state tort law" which Congress intended to preserve under the Atomic Energy Act. 464 U.S. at 255.

Petitioners and supporting *Amici* variously assert that the award in this case is unconstitutional because it (1) greatly exceeds the amount of compensatory damages, (2) greatly exceeds the amount of criminal fines imposed by the legislature for analogous misconduct, and (3) was based on the wealth of the defendant.

This Court has never held that punitive damages must bear some precise ratio to compensatory damages. In *St. Louis R. v. Williams*, 251 U.S. 63 (1919), a railroad that had overcharged a passenger by 66 cents was held liable for a \$75 penalty. This Court held that the penalty was not disproportionate to the offense, explaining that the correct standard was not the comparison with the overcharge but with the public interest in assuring adherence to proper fares. Where compensatory damages reflect lost income, a strict ratio would lead to the irrational conclusion that injuring a poor person or a child is not worthy of as great a penalty as injuring a rich man. Moreover, some injuries do not represent strictly monetary loss. This Court has pointed out that "punitive damages may be the only significant remedy available in § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury." *Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980).

Second, this Court has discerned no constitutional difficulty in punitive damages which exceed fines which the legislature has established. Indeed,

paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme.

*Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984).



Finally, this Court has recognized that taking the wealth of the defendant into account is not only permissible, but is essential to the deterrent purpose of punitive damages. The Court explained in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981), that:

allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, *based on his personal financial resources*, the statute [42 U.S.C. 1983] directly advances the public's interest in preventing repeated constitutional deprivations.

Emphasis added.

Clearly, this Court has endorsed and employed the common-law standard of review of punitive damage verdicts for excessiveness, which is reflected in the Restatement, *supra*: The amount of punitive damages should reflect the nature of the act, the amount of actual or threatened damages, and the wealth of the defendant in the circumstances of the specific case. The primary complaint of the large number of *Amici* is that this standard confers such discretion on juries that amounts of verdicts are unpredictable. Petitioner's Brief at 6, Metromedia Brief at 7; Alliance of American Insurers Brief at 2.

This argument confuses the jury's function with that of a regulatory agency. The jury is charged with doing justice in the case before it. Tailoring the amount of punitive damages to the facts of the case is no vice in a jury; predictability is no virtue. As the Ninth Circuit has accurately explained:

Moreover, any uncertainty as to the amount of permissible punitive damages in any specific case does not invalidate the statute. Fair warning concerning the specific conduct which is prohibited has been provided by the relevant case law. The fact that the amount of a proper damage award may not be precisely known before trial does not make that award unconstitutional.

*Maheu v. Hughes Tool Co.*, 569 F.2d 459, 480 (9th Cir. 1977).

## B. THE EXCESSIVE FINES CLAUSE DOES LIMIT PUNITIVE DAMAGE VERDICTS

### 1. The Eighth Amendment applies only to criminal prosecutions.

Despite this Court's repeated endorsement of the common-law standards of review of punitive damages, and despite the lower court's determination that the verdict in this case was not excessive under those standards, Petitioners argue that the punitive damages verdict in this case is excessive under the Eighth Amendment. This entire argument, repeated by nearly every *Amicus* supporting Petitioners, rests upon a single premise: That the word "fines" in the Eighth Amendment includes punitive damage awards. That premise is false, as is plain from the language, history and purpose of the amendment.

An early decision by this Court held that the Excessive Fines Clause is addressed to courts "exercising criminal jurisdiction." *Ex parte Watkins*, 32 U.S. 568, 573-74 (1831). For the next century and a half, though the Court reviewed numerous punitive damage cases, it found no occasion to address the applicability of the Excessive Fines Clause to civil suits. Then, in *Ingraham v. Wright*, 430 U.S. 651 (1977), this Court undertook a close examination of the text and historical origins of the Eighth Amendment. The Court's definitive conclusion is dispositive of the constitutional issue in this case:

Bail, fines, and punishment traditionally have been associated with the criminal process. By subjecting the three to parallel limitations, the text of the Eighth Amendment suggests an intention to limit the power of those entrusted with the sovereign power of executing the law. An examination of the history of the Amendment and the decisions of this

Court construing the Cruel and Unusual Punishment Clause confirms that the entire Eighth Amendment, including each of its three clauses, was designed to protect those convicted of crimes.

430 U.S. at 664. While it is true that the Court in *Ingraham* was primarily concerned with the application of the Cruel and Unusual Punishment Clause to civil actions, its discussion of the Excessive Fines Clause cannot be distinguished as mere dictum. The Court's interpretation of "the entire Eighth Amendment, including each of its three clauses," was necessary to its holding. This Court reaffirmed its "parallel limitations" view of the three Clauses in the Eighth Amendment in *Solem v. Helm*, 463 U.S. 277, 289 (1983).

**2. The Magna Carta limitation on amercements does not expand the scope of the Excessive Fines Clause to include punitive damages in civil cases.**

Petitioners and supporting *Amici* nevertheless assert that the drafters of the Eighth Amendment intended the word "fines" to include punitive damage awards in civil suits. Their sole support for this novel interpretation is based on Chapter 20 of the Magna Carta, which required that "amercements" be proportionate to the offense. Their argument, briefly, is that amercements in 1215 were the equivalent of modern day punitive damages, that the colonists intended to enjoy the common-law rights conferred by the Magna Carta, and that, therefore, the drafters intended "fines" to include the broader meaning of amercements.

The obvious fallacy is that "amercements" were not the 13th Century equivalent of punitive damages. They were penalties imposed by the King, paid to the King, for breach of the King's peace. See W. McKenchie, *Magna Carta* 284-93 (2d ed. 1914); 2 F. Pollack & F. Maitland, *The History of English Law* 513-19 (2d ed. 1952). As Justice Powell noted for this Court, "an amercement was similar to a modern-day fine.

It was the most common criminal sanction in 13th Century England." *Solem v. Helm*, 463 U.S. 277, 284 n.8 (1983).

More fundamentally, it must be borne in mind that it is the text of the Eighth Amendment, not the Magna Carta, that is at issue here. Although Chapter 20 of the Magna Carta can be viewed as a remote antecedent, the text of the Eighth Amendment was taken verbatim from the English Declaration of Rights of 1688. The original draft of that document explicitly limited its application to criminal cases. In a close historical analysis, Justice Powell stated for this Court:

[T]he exclusive concern of the English version was the conduct of judges in enforcing the criminal law . . . . Although the reference to "criminal cases" was eliminated from the final draft, the preservation of a similar reference in the preamble indicates that the deletion was without substantive significance. Thus, Blackstone treated each of the provision's three prohibitions as bearing only on criminal proceedings and judgments . . . . Indeed, the principal concern of the American Framers appears to have been with the legislative definition of crimes and punishments . . . . But if the American provision was intended to restrain government more broadly than its English model, the subject to which it was intended to apply — the criminal process — was the same.

*Ingraham v. Wright*, 430 U.S. 651, 666 (1977).

Additionally, it must be recalled that courts had been awarding punitive damages in civil cases well before the drafting of the Eighth Amendment. K. Redden, *Punitive Damages* § 2.2 (1980). If the drafters had intended to include such civil awards within the scope of the Eighth Amendment, they would likely have said so explicitly. Even more compelling is the fact that these early cases described punitive damages as compensatory. The rationale of punishment and



deterrence was not developed until well into the 19th Century. K. Redden, *supra* at § 2.2. It is therefore not likely that the drafters would have used the word "fines" to include punitive damage awards.

### 3. Punitive Damages are not criminal penalties.

Petitioners urge that they are entitled to greater constitutional protections than generally accorded civil litigants because punitive damages serve the same purposes as a criminal fine. That punitive damages serve purposes similar to those of the criminal law proves too much. All of tort law serves punishment and deterrent functions. M. Shapo & G. Bell, *Towards a Jurisprudence of Injury*, ch. 4 (1984).

What distinguishes a criminal penalty is that it results from the bringing to bear of the full force of sovereign power — all of the investigative and prosecutorial force of the executive branch of government — against the accused. This is the fundamental difference between a criminal proceeding and a civil suit between private parties, one which explains the imposition of all types of limitations upon the sovereign power. Thus, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), holds that the constitutional limitations usually applicable to criminal proceedings apply as well in a civil proceeding brought by the sovereign in order to punish. Thus, too, this Court has carefully noted the distinction between criminal fines and punitive damages. *Kelly v. Robinson*, 107 S.Ct. 353, 361-62, & n.13 (1986).

## II. PUBLIC POLICY DOES NOT WARRANT THIS COURT'S INTERVENTION INTO STATE TORT LAW.

### A. PUNITIVE DAMAGE AWARDS ARE NOT CREATING A CRISIS.

Petitioners' call for the imposition of a federal constitutional standard of excessiveness for punitive damage awards is a solution in search of a problem. They and various *Amici* portray themselves as the victims of a tort system that is out

of control, plagued by an "explosive" growth in huge punitive verdicts. Until recently, the debate on this issue has suffered from a conspicuous lack of empirical data concerning the size and frequency of punitive damage awards. It is a situation that has fostered anecdotal, speculative, and alarmist assertions that have acquired an undeserved patina of credibility from sheer repetition. See Daniels, *Punitive Damages: Storm on the Horizon?* 1-3 (American Bar Foundation 1986)(collecting notable examples).

Three very recent studies have dispelled the darkness considerably. We still do not have perfect information concerning the civil justice system at the trial level. However, these independent empirical studies have clearly substantiated what trial lawyers have long known: Punitive damage verdicts are not routine; large punitive awards are very rare; and neither the size nor the frequency of such awards is increasing explosively. In short, there is no crisis.

Two of the studies used data collected from trial court records. The more extensive was commissioned by the American Bar Association Special Committee on Punitive Damages and was conducted by the Institute of Civil Justice at the Rand Corporation. M. Peterson, S. Sarma, M. Shanley, *Punitive Damages: Empirical Findings* (Rand Institute for Civil Justice 1987)[hereinafter "Rand Study"]

The Rand Study found that most punitive damage awards remained fairly modest. Various *Amici* have highlighted a portion of the report that shows a percentage increase in punitive damage awards in personal injury cases. The authors themselves warn that because there were so few awards "too much should not be made of it." Rand Study at 12. More important is the conclusion expressed by the authors themselves: "Punitive damages were rarely awarded in personal injury cases and there is little evidence that that frequency has increased significantly." *Id.* at 65.



The ABA Special Committee's own assessment of the study states:

[T]here is no clear evidence of a present or impending crisis in punitive damages. Much of the law is established and working well.

Report of the Special Committee on Punitive Damages, *Punitive Damages: a Constructive Examination I-2* (ABA 1986)[hereinafter "ABA Report"].

A more detailed look at the results of the Rand Study, as summarized by the ABA Report, is worthwhile. The ABA Report notes that, prior to this study, there had been only "anecdotal evidence of practitioners and journalists," with no "solid empirical data" on the basis of which legitimate conclusions could be drawn. *Id.* at 2-1. The Rand data looked at civil trials in Illinois and California, with a particular emphasis upon Cook County and San Francisco.

Specifically, the data showed that during the 25 years from 1960 through 1984, "despite the increase in absolute number, the relative frequency of punitive awards, in proportion to the number of trials and number of plaintiff's verdicts, remained almost unchanged over the entire 25-year period." *Id.* at 2-2.

As to the size of awards, it depends on the type of case. The study found a clear pattern of growth in the size of awards in business and contract suits, while intentional tort and personal injury cases "seem relatively stable as to size of award." *Id.* at 2-4. Moreover, the size of the verdict is only the beginning of the story. As a result of post-trial motions, appeals, and post-trial settlements, fifty percent (50%) of punitive awards of less than \$50,000, and eighty percent (80%) of punitive awards of over \$50,000 were reduced. Indeed, the Commission found, "defendants paid *in toto* only 50% of the punitive damages awarded at trial." *Id.* at 2-5. Once again, the evidence, as distinguished from the hysteria, demonstrates that there is no crisis. *Id.* at 2-1.

At about the same time, the American Bar Foundation conducted a broader study of trial court data from ten states. Daniels, *Punitive Damages: Storm on the Horizon?* [Preliminary Report of the Punitive Damages Project] (American Bar Foundation 1986)[hereinafter "ABF Study"]. That study found, most importantly, that the facts regarding punitive damage awards are not uniform, either geographically or by the type of cases involved. What was clear, however, was that "Punitive damages are not, in the sites we have studies at least, routine, nor are they necessarily awarded in amounts that boggle the mind." ABF Study at 19.

The third study was conducted by Judge Posner and Professor Landes, examining punitive damage awards in appellate cases. Their findings first appeared in "New Light on Punitive Damages," 10 *Regulation* 33 (Sept/Oct 1986). Like the ABA Committee, the American Bar Foundation, and the Rand Institute, they found that the number of punitive damage awards was very small. Indeed in the area of products liability and other accidental torts, they used the term "rare." *Id.* at 36. Their conclusion from the data they examined was that "concern with the incidence of punitive-damage awards may be exaggerated." *Id.* at 33. The authors expanded and updated their study for their widely respected work, W. Landes and R. Posner, *The Economic Structure of Tort Law* (1988). They conclude that the results were consistent with the Rand Study and, in the products liability area, showed the "relative insignificance of punitive damages." *Id.* at 304-06.

Persuasive evidence that the claims of crisis are exaggerated comes from the insurance industry itself. While the cost of liability insurance is a problem for some businesses and professionals, punitive damages are so infrequent that their impact on premiums is slight. A recent study by the industry's rate-setting arm as to the anticipated effect of tort reform proposals found that legislative caps on punitive damages or even their abolition would have little or no impact on the

indemnity value of most claims. Insurance Service Office, Claim Evaluation Project: National Overview 40-42 (1987).

This view was also stated by two major insurance companies to the Florida insurance commissioner. Florida had passed a statute putting a significant cap on punitive damages. Thereafter, Aetna Life & Casualty Company and St. Paul Fire and Marine filed for a rate increase. The insurance commissioner inquired about the effect of the new statute. Aetna reported that the punitive damages cap would have "0" impact. St. Paul reported: "no savings are expected." These statements are reprinted in *The Florida Experience*, published by the National Insurance Consumers Organization (1986).

In the absence of any evidence of a genuine crisis in punitive damage verdicts, some *Amici* complain that the mere possibility of such verdicts is intolerable. The American Medical Association, for example, states: "Although as a practical matter awards against health care providers are extremely rare, the availability of unlimited punitive damages remains a serious source of anxiety for them . . . ." Brief of Pharmaceutical Manufacturers Association and AMA, at 2. The pharmaceutical companies link a "vaccine liability crisis" with punitive damage claims. *Id.* at 17. Extensive research, however, indicates that no maker of DPT vaccine has ever been held liable for punitive damages, and the single punitive verdict involving polio vaccine was reversed on appeal. *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 718 P.2d 1318 (1986). ATLA submits that these subjective fears are not a sufficient basis for this Court's imposition of a federal constitutional standard for tort damages. More importantly, the fear of liability is nothing more than the deterrent effect of the punitive damage remedy. The proper inquiry should be on the condemned conduct, not on the fear of getting caught.

## B. EGREGIOUS MISCONDUCT WARRANTS PUNITIVE DAMAGES.

Petitioners and *Amici* portray themselves as victims of a civil justice system in which punitive damage awards are "capricious in the same way that being struck by lightning is." Brief of Petitioners at 28. If that were truly the case, punitive damages would indeed be irrational, punishing and deterring innocent conduct. The fact is, however, that, in every case in which there is a large verdict, a jury has found that the defendant has done wrong — and not only wrong but willful, wanton wrong, in utter disregard of the rights and dignity of others. Moreover, this determination is subject to judicial scrutiny by trial judges and appellate tribunals. A cursory look at these cases demonstrates that the defendants were not innocent bystanders. They victimized plaintiffs, and frequently numerous others, by willful or reckless conduct that juries and judges properly found was outrageous.

Merrill Lynch, Pierce, Fenner & Smith is a good example. Merrill Lynch submitted an *amicus* brief which screams of the hurt felt by Merrill Lynch through the punitive damages assessed in several cases. But an examination of those cases, we respectfully submit, indicates that pity for the huge broker would be quite misplaced. Excerpts from distinguished judges describe their conclusions about the conduct of Merrill Lynch spread upon the record of each case:

*Malandris v. Merrill Lynch*, 447 F.Supp. 543 (D.Colo. 1977), *affd* with remittitur, *en banc*, 703 F.2d 1152 (10th Cir. 1983) (compensatory, \$1,030,00; punitive, \$3,000,000, remitted to \$1,000,000):

— District Judge Matsch: "the callous and cavalier conduct of the [Merrill Lynch] agent acting in complete disregard of the rights and sensitivities of the plaintiff whose emotional and economic security was in his hands." 447 F.Supp. at 547.



— Circuit Judge Seymour (dissenting as to remittitur): "The record contains abundant evidence of an outrageous course of conduct by defendant's broker . . . . [T]he reprehensible nature of the conduct giving rise to the injury . . . ." 703 F.2d at 1184.

*Arceneaux v. Merrill Lynch*, 595 F.Supp 171 (M.D.Fla., 1984), *affd*, 767 F.2d 1498 (11th Cir. 1985) (compensatory, \$46,675; punitive, \$15,000 to broker, \$300,000 to Merrill Lynch):

— The jury finding that "the broker acted with the intent to defraud or with willful and reckless disregard for the investor's interest," upheld by the trial judge upon post-trial motion and by the Eleventh Circuit upon appeal. 767 F.2d at 1502.

Merrill Lynch was not struck by lightning. Jury after jury has found, and judge after judge has upheld, a pattern of outrageous conduct and utter disregard for the rights of others.

Nor is Merrill Lynch unique. The asbestos industry was well aware by the 1930's that inhalation of asbestos fibers causes painful, fatal lung disease. Yet top company officials hid this information from workers, hid it from the trade publications and the public, and hid it from the government, while amassing millions from sales for installation in ships, buildings, even schools. *See Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986); P. Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (1985).

A.H. Robins, maker of the Dalkon Shield, was not guilty of simply marketing a defective product. After the company learned that its IUD caused serious, even life-threatening pelvic infection, top officials continued to advertise it as safe and withheld vital information from physicians concerning the risks. *See Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984); M. Mintz, *At Any Cost — Corporate Greed, Women, and the Dalkon Shield* (1985).

Before the first Ford Pinto rolled off the dealer's lot, Ford's own tests showed that its fuel tank was susceptible to rupture in moderate collisions. The company knew that hundreds of people would be horribly injured or burned to death. And the company knew how to fix the problem. Nevertheless, Ford rejected the safety modifications in order to save \$10 to \$15 per car. *See Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348, 361 (1981).

Clearly, the corporations represented in the numerous amicus briefs supporting petitioner need not come to this Court to avoid liability for punitive damages. They themselves could do so by avoiding the type of outrageous misconduct described in these cases. Their modest proposal is rather for this Court to use the Constitution to soften consequences of getting caught.

### C. THE COMMON LAW PROVIDES ADEQUATE SAFEGUARDS AGAINST UNDULY HARSH AWARDS.

Petitioners and *Amici* misrepresent the prevailing law of punitive damages as threatening unlimited liability. The truth is that nearly all courts accept the principle that "Punitive damages should be painful enough to provide some retribution and deterrence, but should not be allowed to destroy the defendant." *Arab Termite & Pest Control v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982). Thus, while a defendant is subject to unlimited compensatory damages, courts routinely order remittiturs of punitive awards to avoid the risk of bankrupting the defendant. Ironically, it is by considering the wealth of the defendant that courts afford this protection. *See Maxey v. Freightliner Corp.*, 450 F. Supp. 955, 960-61 (N.D. Tex. 1978); *Morris v. Parke Davis Inc.*, 573 F. Supp. 1324, 1327-28 (C.D.Cal. 1973). As one court notes "judicial scrutiny over the awards provides a partial justification for



allowing such awards in the first place. The spectre of bankruptcy and excessive punishment can be in part dispelled to the extent that trial and appellate courts exercise their powers of review." *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 48 (Alaska 1979).

Courts are in fact exercising that scrutiny. As noted above, the American Bar Association Report found that 50% of jury verdicts were reduced by remittitur or settlement. Indeed, Petitioner's statement that three punitive damage verdicts have exceeded \$100 million, Pet. Br. 11, n.3, is somewhat misleading. Petitioners fail to point out that in the first, *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. Civ. App. 1986), the award of \$100,000,000 was reduced to \$10,000,000. In the second, *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal. Rptr. 348 (1981), the \$125,000,000 was reduced to \$3,500,000. Nor do they point out that in the third, *Kimble v. Tenneco Inc.*, Dist. Ct. Wharton County, Texas, No. 27 880-S, decided December 14, 1988, reported in Foster Natural Gas Report, No. 1702, at p. 1, the compensatory damages for fraudulent actions and false misrepresentations found by the jury was over \$351,000,000, and thus the punitive-compensatory damage ratio was less than 1 to 1. Petitioners also fail to advise the Court that, after that award, the matter was settled and the record sealed.<sup>1</sup>

The issue before this Court is whether the punitive damage award against Petitioner was excessive. We have shown that the common law applied by the states, and by the lower court in this case, supplies a rational and appropriate standard for reviewing the excessiveness of such awards. We have argued that there is no constitutional basis nor any policy

<sup>1</sup> Information as to amount of compensatory damage awarded is in Foster's Report. Information as to settlement and sealing was obtained by counsel in a telephone conversation with a deputy clerk of the Wharton County, Texas, court.

reason for this Court to impose a federal constitutional standard of excessiveness on this system. This, we respectfully submit, is dispositive of the issues properly before this Court.

Nevertheless, since members of this Court have expressed concern that the standards within which juries make such awards might implicate due process considerations, we undertake an examination of those matters.

### III. STATE LAW SUPPLIES STANDARDS FOR PUNITIVE DAMAGES AWARDS THAT FULLY SATISFY DUE PROCESS.

#### A. PETITIONERS FAILED TO PRESERVE ANY OBJECTION TO THE STANDARDS GIVEN TO THE JURY IN THIS CASE.

In *Bankers Life & Casualty Co. v. Crenshaw*, 108 S.Ct. 1645 (1988), where this Court considered but did not reach the issue of constitutional limits on the amount of punitive damage awards, one member of the Court raised the concern that "wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." 108 S. Ct. at 1656 (O'Connor, concurring). Justice O'Connor agreed with the majority, however, that this due process argument had not been sufficiently raised by Bankers Life and therefore could not be resolved at that time. *Id.*

Petitioner in this case similarly failed to preserve any assignment of error relating to due process. In *Baker v. Carr*, 369 U.S. 186 (1962), this Court emphasized the importance of counsel who "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." 369 U.S. at 204.

In this case, Petitioners *did not object* to the trial judge's instruction of the factors to be considered by the jury in determining the amount of punitive damages. As far as the trial court knew, Petitioners were perfectly content with that charge.

Under well settled law, Petitioners could not have been heard on appeal concerning the instructions given the jury. F.R. Civ. P. 51(a); *Springfield v. Kibbe*, 107 S.Ct. 1114, 1115-16 (1987); *Deppe v. Tripp*, 863 F.2d 1353, 1360-62 (7th Cir. 1988); 9 Wright & Miller, Civil, *Federal Prac.* §§ 2553-54. And in fact Petitioners did not argue to the Second Circuit that the jury had not been sufficiently cabined by adequate instructions on the factors to be considered in assessing the amount of punitive damages.

**B. THE DUE PROCESS CLAUSE MANDATES ONLY MINIMAL PROCEDURAL PROTECTIONS FOR LITIGANTS IN PRIVATE CIVIL ACTIONS.**

Should the Court undertake an examination of due process despite Petitioners' failure to raise the issue, we respectfully submit that it should do so in light of this Court's long history of permitting state courts to determine matters of local tort law and procedure without interference. The weighty influence of the Due Process guarantee which permeates every aspect of criminal proceedings where life or liberty hang in the balance, is barely discernible in private civil suits where "mere money" is at stake. *Addington v. Texas*, 441 U.S. 418, 423-24 (1979); *Santosky v. Kramer*, 455 U.S. 745, 755-56 (1982). Indeed, this Court has found in the due process clause only the rights to notice and an opportunity to be heard and fundamental fairness in the court's assertion of jurisdiction. *Standard Oil Co. v. Missouri*, 224 U.S. 270, 287 (1911);<sup>2</sup> see, e.g., *International Shoe v. Washington*, 326 U.S. 310 (1945); *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950); *Fuentes v. Shevin*, 407 U.S. 67 (1982). Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (procedural limits on assessing punitive damages which could chill protected speech).

<sup>2</sup> In *Standard Oil* this Court stated the following:

(footnote continues)

**C. THE STATE AND FEDERAL COURTS NOW INSTRUCT ON THE RELEVANT FACTORS AND, UPON POST-VERDICT MOTION OR APPEAL, APPLY THOSE FACTORS, WHEN ARGUED AND WHEN APPROPRIATE, TO REVIEW PUNITIVE DAMAGES AWARDS.**

Juries should be given clear and specific instructions as to the proper factors which must guide their assessment of punitive damages. Of that there can be no dispute. Whether such standards are required by the Due Process Clause is an open question. This Court need not resolve that question, however. The reality is that the state courts in every jurisdiction have developed a well-defined set of guidelines for juries.

Of course, juries are told that the purpose of punitive damages is to punish and to deter both the defendant and others from committing like or similar acts. Even more, juries are instructed on the factors to consider in determining the size of an award that will accomplish these purposes. The case law of course differs from state to state. And the factors emphasized differ from case to case — depending on the facts of the case and the arguments made by counsel. But there are

(footnote continued)

The 14th Amendment guarantees that the defendant shall be given that character of notice and opportunity to be heard which is essential to due process of law. When that has been done, the requirements of the Constitution are met, and it is not for this court to determine whether there has been an erroneous construction of statute or common law . . . . The matter was summed up by Justice Moody in *Twining v. New Jersey*, 211 U.S. 110, [111], where, citing many authorities, he said:

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, . . . and that there shall be notice and opportunity for hearing given the parties . . . . Subject to these two fundamental conditions, . . . this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law."

224 U.S. at 287.



certain factors that reoccur with great frequency. And, as is only proper in our system, these same factors are used in post-trial judicial evaluation as to whether a punitive-damages award is within reasonable bounds.

In an appendix to this Brief, we have gathered cases from every state in which punitive damages are permitted, which set forth the specific factors to guide juries. Moreover, trial judges and appellate courts in the cases often use one or more of these factors to reduce or reverse an award of punitive damages. We submit that this carefully developed set of factors clearly satisfies the fundamental fairness notions embedded in the Due Process Clause.

It is worth examining the specific factors applied in the state and federal courts. In a footnote following each, there is an abbreviated reference to the states and cases to be found in the Appendix to this Brief:

1. The nature of the conduct of the wrongful party which the jury found to have been willful, wanton, reprehensible, in calculating disregard of the rights and dignity of others.<sup>3</sup>

<sup>3</sup> Alaska: *The Alaskan Village, Inc. v. Smalley, Ben Lomond, Inc. v. Campbell*; Arkansas: *Holmes v. Hollingsworth, Willis v. Elledge*; California: *Neal v. Farmers Ins. Exch., Pistorius v. Prudential Ins.*; Colorado: *Mailloux v. Bradley, Malandris v. Merrill Lynch*; Georgia: *Suber v. Fountain*; Idaho: *Boise Dodge, Inc. v. Clark, Williams v. Bone*; Illinois: *Bucher v. Krause*; Indiana: *Indiana & Mich. Elec. Co. v. Stevenson, Tutwiler v. Snodgrass*; Iowa: *Northrup v. Miles Homes, Inc. of Iowa*; Kansas: *Henderson v. Hassur, Slough v. J.I. Case Co.*; Kentucky: *Buford v. Hopewell*; Minnesota: *Gryc v. Dayton-Hudson Corp., Hammersten v. Reiling*; Montana: *Safeco Ins. v. Ellinghouse*; Nevada: *Ace Truck & Equip. Rentals v. Kahn*; New Jersey: *Nappe v. Aschelewitz, Barr*; New Mexico: *Chavez-Rey v. Miller*; New York: *Reynolds v. Pegler*; Pennsylvania: *Hughes v. Babcock, Sulecki v. Southeast Nat'l Bank, Feld v. Merriam*; South Carolina: *Rogers v. Florence Printing Co.*; South Dakota: *Gross v. Kauf*; Tennessee: *Suzore v. Rutherford, Coppinger Color Lab v. Nixon*; Texas: *Alamo Nat'l Bank v. Kraus, Crider v. Appelt, K-Mart Corp. v. Trotti, Russell v. Truitt*; Utah: *Powers v. Taylor*; Vermont: *Ellsworth v. Potter*; Wisconsin: *Brown v. Maxey, Jones v. Fisher*; Wyoming: *Sears v. Summit, Inc.*

2. The degree of willfulness, wantonness, or reprehensibility.<sup>4</sup>

3. Whether it was calculated and the degree of calculation.<sup>5</sup>

4. The motivation or intent of the wrongdoer.<sup>6</sup>

<sup>4</sup> Alabama: *Johnson Publg. v. Davis*; California: *Neal v. Farmers Ins. Exch., Collins v. Jones, Pistorius v. Prudential Ins., Miller v. Nat'l American Life*; Colorado: *Taylor v. Sandoval*; Delaware: *Sheats v. Bowen, Riegel v. Aastad*; Florida: *Wackenhut Corp. v. Canty*; Hawaii: *Beerman v. Toro Mfg. Howell v. Assoc. Hotels*; Idaho: *Boise Dodge, Inc. v. Clark*; Maryland: *Casale v. Dooner Lab, Inc.*; Missouri: *Hoene v. Associated Dry Goods, State ex rel. Atchinson v. Ellison, Citizen's Bank v. Gehl, Beggs v. University C.I.T. Corp.*; New York: *Reynolds v. Pegler*; North Dakota: *Smith v. American Family Mut. Ins.*; Ohio: *W.R. Grace & Co. v. Hargadine*; Pennsylvania: *Thomas v. E.J. Korvette, Delehanty v. First Pennsylvania Bank*; South Dakota: *Gross v. Kauf*; Tennessee: *Suzore v. Rutherford*; Texas: *Alamo Nat'l Bank v. Kraus, K-Mart Corp. v. Trotti, Russell v. Truitt, Parker v. McGinnes*; Utah: *Holdaway v. Hall*; Vermont: *Ellsworth v. Potter*; West Virginia: *Leach v. Biscayne Oil & Gas*; Wisconsin: *Fahrenberg v. Tengel*.

<sup>5</sup> Idaho: *Boise Dodge, Inc. v. Clark*; North Dakota: *Smith v. American Family Mut. Ins.*; West Virginia: *Leach v. Biscayne Oil & Gas*.

<sup>6</sup> Arkansas: *Holmes v. Hollingsworth*; California: *Collins v. Jones*; Idaho: *Boise Dodge, Inc. v. Clark*; Illinois: *Bucher v. Krause*; Kansas: *Henderson v. Hassur, Slough v. J.I. Case Co.*; Minnesota: *Gryc v. Dayton-Hudson Corp., Hammersten v. Reiling*; New Jersey: *Nappe v. Aschelewitz, Barr*; North Dakota: *Smith v. American Family Mut. Ins.*; Pennsylvania: *Hughes v. Babcock, Feld v. Merriam, Chuy v. Philadelphia Eagles Football Club*; South Dakota: *Gross v. Kauf*; Tennessee: *Suzore v. Rutherford*; Utah: *Powers v. Taylor*; West Virginia: *Leach v. Biscayne Oil & Gas*; Wisconsin: *Brown v. Maxey, Jones v. Fisher, Fahrenberg v. Tengel*.



5. Any other factors attenuating the conduct, including mitigating and aggravating factors.<sup>7</sup>

6. The actual injury caused or the potential injury that could have been caused by the wrongful conduct.<sup>8</sup>

<sup>7</sup> Arkansas: *Holmes v. Hollingsworth*; Delaware: *Sheats v. Bowen*; District of Columbia: *Robinson v. Sarisky*; Georgia: *Suber v. Fountain*; Iowa: *Northrup v. Miles Homes, Inc. of Iowa*; Kansas: *Henderson v. Hassur, Slough v. J.I. Case Co.*; Maine: *Hanover Ins. v. Haywood*; Minnesota: *Gryc v. Dayton-Hudson Corp.*, *Hammerstein v. Reiling*; Mississippi: *Richards v. Allstate Ins. Co.*; New Jersey: *Nappe v. Aschelewitz, Barr*; New Mexico: *Chavez-Rey v. Miller*; North Dakota: *Dahlen v. Landis*; Ohio: *W.R. Grace & Co. v. Hargadine*; Oregon: *Orchard View Farms v. Martin Marietta Aluminum*; South Carolina: *Rogers v. Florence Printing Co.*; South Dakota: *Stene v. Hillgren*; Tennessee: *Suzore v. Rutherford*; West Virginia: *Leach v. Biscayne Oil & Gas*.

<sup>8</sup> Alabama: *Askin & Marine Co. v. King*; Arkansas: *Gordon v. McLearn*; California: *Neal v. Farmers Ins. Exch.*, *Collins v. Jones, Pistorius v. Prudential Ins.*, *Parrott v. Bank of America*, *Little v. Stuyvesant Life*; Colorado: *Mailloux v. Bradley, Taylor v. Sandoval, Malandris v. Merrill Lynch*; Delaware: *Sheats v. Bowen*; Florida: *Wackenhut Corp. v. Canty*; Idaho: *Boise Dodge, Inc. v. Clark, Williams v. Bone*; Indiana: *Indiana & Mich. Elec. Co. v. Stevenson*; Kansas: *Henderson v. Hassur, Slough v. J.I. Case Co.*; Kentucky: *Buford v. Hopewell*; Minnesota: *Hammersten v. Reiling, Sweeney v. Meyers*; Missouri: *Citizen's Bank v. Gehl, Beggs v. University C.I.T. Corp.*, *Ogilvie v. Fotomat Corp.*; Montana: *Safeco Ins. v. Ellinghouse*; Nevada: *Ace Truck & Equip. Rentals v. Kahn*; New Jersey: *Fischer v. Johns-Manville Corp.*, *Nappe v. Aschelewitz, Barr*; New Mexico: *Faubion v. Tucker*; North Dakota: *Smith v. American Family Mut. Ins.*; Pennsylvania: *Hughes v. Babcock, Delehanty v. First Pennsylvania Bank, Sulecki v. Southeast Nat'l Bank, Chuy v. Philadelphia Eagles Football Club*; South Carolina: *Rogers v. Florence Printing Co.*; South Dakota: *Gross v. Kauf*; Tennessee: *Suzore v. Rutherford, Coppinger Color Lab v. Nixon*; Texas: *Parker v. McGinnes*; Utah: *Powers v. Taylor, Holdaway v. Hall*; Virginia: *Gazett, Inc. v. Harris*; West Virginia: *Leach v. Biscayne Oil & Gas, Hess v. Marinari*; Wisconsin: *Brown v. Maxey, Fahrenberg v. Tengel*; Wyoming: *Sears v. Summit, Inc.*

7. The amount of the compensatory damages.<sup>9</sup>

8. The character of the wrongful party.<sup>10</sup>

<sup>9</sup> Alaska: *The Alaskan Village, Inc. Smalley*; Arkansas: *Gordon v. McLearn*; California: *Neal v. Farmers Ins. Exch.*, *Collins v. Jones, Pistorius v. Prudential Ins.*, *Little v. Stuyvesant Life*; Colorado: *Mailloux v. Bradley, Taylor v. Sandoval, Malandris v. Merrill Lynch*; Florida: *Wackenhut Corp. v. Canty*; Iowa: *Jacobson v. Benson Motors, Inc.*; Kansas: *Henderson v. Hassur, Slough v. J.I. Case Co.*; Montana: *Safeco Ins. v. Ellinghouse*; New Mexico: *Faubion v. Tucker*; North Dakota: *Smith v. American Family Mut. Ins.*; Pennsylvania: *Hughes v. Babcock, Delehanty v. First Pennsylvania Bank, Sulecki v. Southeast Nat'l Bank, Chuy v. Philadelphia Eagles Football Club*; South Carolina: *Rogers v. Florence Printing Co.*; South Dakota: *Gross v. Kauf*; Tennessee: *Suzore v. Rutherford, Coppinger Color Lab v. Nixon*; Texas: *Parker v. McGinnes*; West Virginia: *Leach v. Biscayne Oil & Gas*; Wisconsin: *Brown v. Maxey, Fahrenberg v. Tengel*; Wyoming: *Sears v. Summit, Inc.*

<sup>10</sup> Illinois: *Bucher v. Kraus*; Minnesota: *Hamersten v. Reiling*; Missouri: *Hoene v. Associated Dry Goods, State ex rel. Atchinson v. Ellison, Citizens Bank v. Gehl*; Montana: *Safeco Ins. v. Ellinghouse*; New York: *Reynolds v. Pegler*; North Dakota: *Dahlen v. Landis*; Pennsylvania: *Feld v. Merriam, Chuy v. Philadelphia Eagles Football Club*; South Dakota: *Stene v. Hillgren*; Tennessee: *Suzore v. Rutherford*; Texas: *Alamo Nat'l Bank v. Kraus, K-Mart Corp. v. Trotti, Russell v. Truitt*; Vermont: *Ellsworth v. Potter*; West Virginia: *Leach v. Biscayne Oil & Gas, Hess v. Marinari*.

9. The wealth, or the lack thereof, of the wrongful party.<sup>11</sup> These factors are considered to determine the amount that is proper punishment and a proper deterrence within the facts of that particular case. The amount of compensatory damages awarded is one of those facts. And a reasonable relation between the compensatory damages and the punitive award

<sup>11</sup> Alaska: *The Alaskan Village, Inc. v. Smalley, Ben Lomond, Inc. v. Campbell*; Arizona: *Nienstedt v. Wetzel*; Arkansas: *Holmes v. Hollingsworth*; California: *Neal v. Farmers Ins. Exch., Pistorius v. Prudential Ins., Parrott v. Bank of America, Miller v. Nat'l American Life, Merlo v. Standard Life, Little v. Stuyvesant Life*; Colorado: *Mailloux v. Bradley, Malandris v. Merrill Lynch*; District of Columbia: *Robinson v. Sarisky, Quinn v. DiGuilian*; Florida: *Wackenhut Corp. v. Canty*; Hawaii: *Beerman v. Toro Mfg., Howell v. Assoc. Hotels*; Indiana: *Indiana & Mich. Elec. Co. v. Stevenson, Tutwiler v. Snodgrass*; Kansas: *Henderson v. Hassur, Slough v. J.I. Case Co.*; Maine: *Hanover Ins. v. Haywood*; Maryland: *Carl M. Freeman Assoc. v. Murray*; Michigan: *Rodgers v. Fisher Body Div.*; Minnesota: *Gryc v. Dayton-Hudson Corp., Hammersten v. Reiling, Sweeney v. Meyers*; Mississippi: *Bankers Life v. Crenshaw*; Missouri: *Hoene v. Associated Dry Goods, State ex rel. Atchison v. Ellison, Citizens Bank v. Gehl*; Montana: *Safeco Ins. v. Ellinghouse, Johnson v. Horn*; Nevada: *Ace Truck & Equip. Rentals v. Kahn*; New Jersey: *Fischer v. Johns-Manville Corp.*; New Mexico: *Aragon v. General Elec. Credit Corp.*; New York: *Diapulse Corp. v. Birtcher Corp.*; North Carolina: *Arnold v. Sharpe*; North Dakota: *Dahlen v. Landis*; Ohio: *Spadafore v. Blue Shield, Shimman v. Frank*; Oklahoma: *Fife v. Adair, Jones v. Lennington*; Oregon: *State ex rel. Thesman v. Dooley*; Pennsylvania: *Thomas v. E.J. Korvette*; Rhode Island: *Norel v. Grochowski*; South Carolina: *Rogers v. Florence Printing Co., Wright v. Charles Pfizer & Co.*; South Dakota: *Gross v. Kauf*; Tennessee: *Suzore v. Rutherford, Coppinger Color Lab v. Nixon*; Utah: *Wilson v. Oldroyd*; Vermont: *Woodhouse v. Woodhouse, Parker v. Hoefer*; Virginia: *Derring's Adm'r v. Va. Ry. & Power Co., Sperry Rand Corp. v. ATQ, Inc.*; West Virginia: *Hess v. Marinari*; Wisconsin: *Brown v. Maxey, Jones v. Fisher, Fahrenberg v. Tengel*; Wyoming: *Sears v. Summit, Inc., Campen v. Stone*.

is sought — but reasonable in terms of the facts and circumstances of that particular case, which include the conduct, the character, and the circumstances of the defendant.<sup>12</sup>

These are the concrete factors that are supplied by state law. Juries do not run amok, standardless, lacking the usual controls of instructions and judicial review. Counsel routinely proffer instructions based upon the factors that are relevant to the particular suit. And on postverdict review and appeal, judges use these factors to evaluate the reasonableness of the verdict. We submit that no more concrete or relevant factors could be constitutionally compelled under either the Excessive Fines Clause or the Due Process Clause.

#### IV. FLEXIBILITY OF PUNITIVE DAMAGES IS A VIRTUE, NOT A VICE.

Finally, we are told that the greatest evil of punitive damages is their unpredictability. It is true that one who is about to embark upon a course of misconduct of the type involved in these cases is not readily able to predict the maximum of his potential liability if he is caught. Just so. That is the essence of deterrence. If a defendant can anticipate his exposure and absorb it as a cost of doing business, he has, in effect, purchased a license to do evil. A leading court explains:

Compensatory damages are often foreseeable as to amount, within certain limits difficult to reduce to a formula but nonetheless familiar to the liability insurance industry. Anticipation of these damages

<sup>12</sup> Arizona: *Nienstedt v. Wetzel*; Arkansas: *Holmes v. Hollingsworth, Gordon v. McLearn*; Delaware: *Sheats v. Bowen*; District of Columbia: *Quinn v. DiGuilian*; Florida: *Wackenhut Corp. v. Canty*; Kansas: *Henderson v. Hassur, Slough v. J.I. Case Co.*; Minnesota: *Hammersten v. Reiling*; Missouri: *State ex rel. Atchison v. Ellison*; New Mexico: *Faubion v. Tucker, Chavez-Rey v. Miller*; North Dakota: *Dahlen v. Landis*; Ohio: *W.R. Grace & Co. v. Hargadine*; Pennsylvania: *Hughes v. Babcock, Feld v. Merriam, Chuy v. Philadelphia Eagles Football Club*; South Dakota: *Gross v. Kauf, Stene v. Hillgren*; Tennessee: *Suzore v. Rutherford*; Vermont: *Ellsworth v. Potter*.

will allow potential defendants, aware of dangers of a product, to factor those anticipated damages into a cost-benefit analysis and to decide whether to market a particular product. The risk and amount of such damages can, and in some cases will, be reflected in the cost of a product, in which event the product will be marketed in its dangerous condition.

*Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466, 477 (1986). And if punitive damages were predictable, they would fail to the same extent:

If punitive damages are predictably certain, they become just another item in the cost of doing business, much like other production costs . . . .

*Palmer v. A.H. Robins Co.*, 684 P.2d 187, 218 (Colo. 1984).

It is this system — under which punitive damages are transformed from a deterrent against misconduct into the price of a license to do evil, — that Petitioners and *Amici* would have this Court enshrine with constitutional protection.

We respectfully submit that that is what this case is really about.

## CONCLUSION

For the foregoing reasons, it is respectfully urged that the judgment of the court below be affirmed upon a holding that the Excessive Fines Clause of the Eighth Amendment has no application to punitive damages awards in civil cases and that no reason has been shown for this Court to intervene in this area under the Due Process Clauses.

Respectfully submitted,

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## APPENDIX

**Alabama:** Enormity of the wrong (*Johnson Pub. v. Davis*, 271 Ala. 474, 124 So.2d 441, 450 (1960) (punitive award of \$67,500 reduced to \$45,000; compensatory-punitive ratio: 1 to 30)); reasonable proportion to the injury sustained (*Askin & Marine Co. v. King*, 22 Ala.App. 452, 116 So. 804, 806 (1928) (compensatory-punitive ratio: 1 to 1,200)).

**Alaska:** Magnitude of the offense; amount of compensatory damage; importance of the policy violated; defendant's wealth (*Alaskan Village, Inc. v. Smalley*, 720 P.2d 945, 949 (1986) (\$235,000 compensatory, \$550,000 punitive)); magnitude and flagrancy of the offense; importance of the policy violated; wealth of defendant (*Ben Lomond, Inc. v. Campbell*, 691 P.2d 1042, 1048 (1984) (\$13,000 compensatory, \$50,000 punitive)).

**Arizona:** Wealth of the defendant as one factor among all the circumstances (*Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876, 885 (Ct.App. 1982) (\$7,350 compensatory; \$50,000 punitive); *Southern Pac. v. Lueck*, 111 Ariz. 560, 535 P.2d 599, 609 (1975) (\$2,000,000 compensatory; \$1,080,000 punitive, upheld where defendant has net assets of \$1,712,727,000 and \$165,555,000 annual income)).

**Arkansas:** Nature, extent, and enormity of the wrong; intent of the party committing the wrong; all the circumstances attendant upon the act, including any mitigating circumstances; wealth of the defendant (*Holmes v. Hollingsworth*, 234 Ark. 347, 352 S.W.2d 96, 99 (1961) (\$4,000 compensatory; \$5,000 compensatory reduced to \$2,500 because of the lack of wealth of the defendant); the wrongful act of the defendant and the degree of its badness (*Willis v. Elledge*, 242 Ark. 305, 413 S.W.2d 636, 639 (1967) (\$2,500 compensatory; \$5,000 punitive reduced to \$2,500); relation between compensatory and punitive considering all of the circumstances of the case (*Gordon v. McLearn*, 185 S.W. 803, 805 (1916) (\$25 compensatory; \$1,000 punitive

reduced to \$200)); *Vogler v. O'Neal*, 226 Ark. 1007, 295 S.W.2d 629 (1956) (\$10,739 compensatory; \$10,000 punitive award reduced to \$5,000)).

**California:** Nature of defendant's acts in light of the whole record; degree of reprehensibility of the wrongful act; amount of compensatory damages; wealth of defendant (*Neal v. Farmers Ins. Exch.*, 21 Cal.3d 910, 582 P.2d 980, 990 (1978) (\$9,573 compensatory; \$1,518,638 punitive reduced by trial court to \$739,538, aff'd, defendant's gross assets \$765,000,000, net assets \$211,000,000, annual income \$45,000,000)); circumstances of the particular wrongful act; degree of aggravation in wrongful act; amount and type of injury caused plaintiff; motivation of defendant (*Collins v. Jones*, 131 Cal.App. 747, 22 P.2d 39, 43 (1933); nature of wrongful act; degree of reprehensibility; amount of compensatory damages; wealth of defendant (*Pistorius v. Prudential Ins.*, 123 Cal.App.3d 541, 176 Cal.Rptr.660, 668 (1981) (\$45,000 compensatory; \$50 billion gross assets, \$2 billion net worth)); injury caused to the plaintiff; wealth of defendant (*Parrott v. Bank of America*, 97 Cal.App.2d 14, 217 P.2d 89, 96 (1950)); outrageousness of the act; wealth of the defendant (*Miller v. National American Life*, 54 Cal.App. 3d 331, 126 Cal.Rptr. 731, 739 (1976) (\$9,203 compensatory; \$125,000 punitive, reduced to \$40,000 on ground that the act was not so outrageous and the defendant's wealth was not so large as to justify \$125,000)); wealth of defendant (*Merlo v. Standard Life*, 59 Cal.App.3d 5, 130 Cal.Rptr. 416, 425 (1976) (\$267,294 compensatory; \$500,000 punitive reversed as disproportionate to defendant's net worth)); net worth of the defendant; reasonable relation to compensatory damages (*Little v. Stuyvesant Life*, 67 Cal.App.3d 451, 136 Cal. Rptr. 653, 663 (1977) (\$172,325 compensatory; \$2,500,000 punitive reduced to \$250,000 on ground that \$2,500,000 is disproportionate to defendant's net worth)); *Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d 821, 174 Cal.Rptr. 348 (1981) (\$2,516,000 compensatory, \$125,000,000 punitive reduced to \$3,500,000 by trial court, aff'd).

**Colorado:** Nature of act which caused the injury; severity of the wrong; amount of compensatory damages; economic status of the defendant (*Mailloux v. Bradley*, 643 P.2d 797, 799 (Ct.App. 1982) (\$380 compensatory; \$11,000 punitive; aff'd in view of defendant's income of \$10,000 per month, ownership of his own business as well as rental property)); degree of defendant's malice; gravity of plaintiff's injury; amount of compensatory damage (*Taylor v. Sandoval*, 442 F.Supp. 491, 496 (D.Colo. 1977) (\$1 compensatory; \$4,000 punitive, reduced to \$5 punitive by trial judge)); nature of wrongful act; economic status of defendant; amount of compensatory damages (*Malandris v. Merrill Lynch*, 447 F.Supp. 543, 546 (D.Colo. 1977), 703 F.2d 1152 (10th Cir. 1981) (\$1,030,000 compensatory; \$3,000,000 punitive reduced to \$1,000,000 on appeal upon a reweighing of the factors)); *Alley v. Gubser Devel. Co.*, 569 F.Supp. 36, 40 (D.Colo. 1986) (\$50,000 compensatory; \$510,000 punitive, reduced to \$150,000 punitive on ground that harm was not so great, the degree of malice was not so high as to justify the ratio of punitive to compensatory).

**Connecticut:** Punitive damages limited to litigation expenses (*Waterbury Petrol. v. Canaan Oil*, 477 A.2d 988, 1003 (1984)).

**Delaware:** Circumstances and facts of the case; degree of maliciousness, wantonness or grossness; extent of the injuries caused (*Sheats v. Bowen*, 318 F.Supp. 640, 645 (D.Del. 1970); *Reynolds v. Willis*, 209 A.2d 760, 763 (1965) (in *Sheats*, \$67,500 compensatory; \$32,500 punitive); degree of reprehensibility (*Riegel v. Aastad*, 272 A.2d 715, 718 (1970) (\$90,000 compensatory; \$60,000 punitive reduced to \$10,000 on ground that act was not sufficiently reprehensible for the larger award)).

**District of Columbia:** Duration and cost of litigation; wealth of defendant (*Robinson v. Sarisky*, 535 A.2d 901, 907 (1988)); all the circumstances, including financial situation of



defendant (*Quinn v. DiGiulian*, 739 F.2d 637, 641 (D.C.Cir. 1984)).

**Florida:** Circumstances of each case; degree of malice, wantonness, oppressiveness, outrage; size of compensatory damages; wealth of the defendant (*Wackenhut Corp. v. Canty*, 359 So.2d 430, 436 (1978) (\$50,000 compensatory; \$180,000 punitive found by jury, reduced to \$50,000 by trial judge, \$180,000 reinstated by district court of appeals, aff'd by Supreme Court, noting that punitive award is 2% of defendant's net worth)); *Wynn Oil Co. v. Purolator Chem. Corp.*, 403 F.Supp. 226 (M.D.Fla. 1974) (\$1,000,000 compensatory; \$4,000,000 punitive, reduced to \$1,000,000 punitive on ground that \$4,000,000 is too high relative to the wealth of the defendant; \$2,000,000 punitive against a second defendant was upheld); *City Stores Co. v. Mazzaferro*, 342 So.2d 827 (App. 1977) (\$10,000 punitive award reversed on ground of defendant's lack of wealth).

**Georgia:** The character of the wrongful acts committed and the length of time over which they were committed (*Suber v. Fountain*, 151 Ga.App. 283, 259 S.E.2d 685, 690 (1979) (\$1,253 compensatory; \$40,000 punitive)).

**Hawaii:** Degree of malice, oppression, or gross negligence of the wrongful act; financial condition of defendant (*Beerman v. Toro Mfg.*, 1 Haw.App. 111, 615 P.2d 749, 755 (1980)); same factors (*Howell v. Assoc. Hotels*, 40 Haw. 492, 501 (1954)).

**Idaho:** The wrongful act of the defendant; the culpability of the defendant's conduct; motives actuating the defendant's conduct; degree of calculation by the defendant; extent of defendant's disregard of rights of others; the amount of actual damage caused by defendant; sociological significance of a punitive award as a deterrent in this situation (*Boise Dodge, Inc. v. Clark*, 92 Idaho 902, 453 P.2d 551, 556 (1969)

(\$350 compensatory; \$12,500 punitive)); the injury complained of; the wrongful act; the actual damages suffered (*Williams v. Bone*, 74 Idaho 185, 259 P.2d 810, 813 (1953) (\$700 compensatory, \$750 punitive, reduced by appellate court to \$200 compensatory, \$500 punitive)).

**Illinois:** Circumstances and manner of the wrongful act of the defendant; motive, purpose, condition of mind and heart of the defendant (*Bucher v. Krause*, 200 F.2d 576, 587 (7th Cir. 1953)); case by case examination of the facts (*Stambaugh v. Int'l Harv'r Co.*, 106 Ill.App.3d 1, 435 N.E.2d 729, 747 (1982), rev'd on other grounds, 102 Ill.2d 250, 464 N.E.2d 1011 (1984) (\$650,000 compensatory, \$15 million punitive, reduced by trial judge to \$7,500,000 punitive, and further reduced by appellate court to \$650,000 punitive)).

**Indiana:** Nature of the wrong; extent of the actual damages; wealth of the defendant (*Indiana & Mich. Elec. Co. v. Stevenson*, 173 Ind.App. 329, 363 N.E.2d 1254, 1262 (1977) (\$420 compensatory, \$110,000 punitive, affirmed upon recognition the defendant had assets of \$1,544,638,000 and annual income of \$43,924,000)); nature of the wrong; amount likely to impact upon the defendant; amount likely to deter others from future similar wrongs; wealth of defendant (*Tutwiler v. Snodgrass*, 428 N.E.2d 1291, 1298 (App. 1981) (\$1,660 compensatory, \$150,000 punitive reduced by trial court to \$75,000, aff'd on recognition that defendant has net worth of \$8 million)); *Bangert v. Hubbard*, 127 Ind.App. 579, 126 N.E.2d 778 (1957) (\$14,900 punitive, reversed as disproportionate to actual damage of \$100).

**Iowa:** Reasonable relationship to compensatory award (*Jacobson v. Benson Motors, Inc.*, 216 N.W.2d 396, 405 (1974); conduct of defendant, whether amount shocks the conscience of the court, amount needed to punish and deter (*Northrup v. Miles Homes, Inc.*, 204 N.W.2d 850, 861 (1973) (\$5,000 compensatory, \$15,000 punitive, aff'd)).



**Kansas:** Nature, extent, enormity of the wrong; intent of the party committing the wrong; all circumstances attendant on the act; any mitigating factors; amount of actual damage; probably litigation expenses; defendant's financial condition (*Henderson v. Hassur*, 225 Kan. 678, 594 P.2d 650, 663 (1979) (\$48,000 compensatory, \$215,000 punitive, court noting net worth of defendant of \$1,069,349); same factors noted in *Slough v. J.I. Case Co.*, 8 Kan.App. 104, 650 P.2d 729, 735 (1982) (\$55,500 compensatory, \$350,000 punitive, reduced to \$150,000 punitive, the court noting that the defendant has \$1,227,377,000 total assets, with \$553,181,000 stockholders' equity, with \$150,000 representing the profit after cost of goods produced on \$1,820,000 in sales), *Ultimate Chem. Co. v. Surface Transp. Int'l*, 232 Kan. 727, 658 P.2d 1008 (1983) (\$102,000 compensatory, \$227,000 punitive), *George v. Bolen*, 2 Kan.App. 385, 580 P.2d 1357 (1978) (\$180,000 compensatory, \$184,647 punitive, reduced by appellate court to \$35,000 punitive).

**Kentucky:** The wrongful act causing injury; the injury caused (*Buford v. Hopewell*, 144 Ky. 666, 131 S.W. 502, 503 (1910) (\$2,500 combined compensatory and punitive, rev'd on ground that injury was not very serious)).

**Louisiana:** No punitive damages without specific statutory authorization (*Phillipe v. Browning Arms Co.*, 375 So.2d 151, 157 (App. 1979), aff'd, 395 So.2d 310 (1980)).

**Maine:** Weighing of all aggravating and mitigating factors including defendant's good faith and any other factor indicating a punitive award would not serve a deterrent function; defendant's wealth (*Hanover Ins. v. Hayward*, 464 A.2d 156, 158 (1983)); *Auburn Harpswell Ass'n v. Day*, 438 A.2d 234, 237 (1981) (\$50 compensatory, \$3,000 punitive).

**Maryland:** The degree of maliciousness, wantonness, reckless disregard of the rights of others (*Casale v. Dooner Labs., Inc.*, 343 F.Supp. 917, 919 (D.Md. 1972), aff'd, 503 F.2d 303 (4th Cir. 1973) (\$8,744 compensatory, \$80,000

punitive, reduced by trial court to \$40,000 punitive on ground that the maliciousness, wantonness, reckless disregard by the defendant was not so bad as to warrant the higher amount)); wealth of defendant (*Carl M. Freeman Assoc. v. Murray*, 18 Md.App. 419, 306 A.2d 548, 554 (1973) (\$15,000 compensatory, \$35,000 punitive, reduced to \$10,000 by trial court; aff'd though defendant's net worth is \$24,000,000)); wealth of defendant (*D.C. Transit v. Brooks*, 264 Md. 578, 287 A.2d 251, 257 (1972) (\$450 compensatory, \$10,000 punitive, aff'd)).

**Massachusetts:** No punitive without statutory authority (*Santana v. Registrars*, 398 Mass. 862, 502 N.E.2d 132, 134 (1986)).

**Michigan:** Wealth of defendant could be considered (*Rodgers v. Fisher Body Div.*, 575 F.Supp. 12, 17 (W.D.Mich. 1982) (\$300,000 compensatory, \$500,000 punitive upheld by trial judge)).

**Minnesota:** The wrongful act of defendant; was defendant aware; what defendant could have done to prevent the harm; wealth of the defendant; amount of profit earned by defendant from the product involved; degree to which defendant has already been punished (*Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 741 (1980) (\$750,000 compensatory, \$1,000,000 punitive); nature of defendant's conduct; nature and extent of harm to plaintiff which defendant caused or intended to cause; all circumstances including motive of defendant, relation between the parties, provocation or want of provocation; wealth of defendant (*Hammersten v. Reiling*, 262 Minn. 200, 115 N.W.2d 259, 266 (1962) (\$12,500 compensatory, \$7,500 punitive, aff'd with reduction in compensatory to \$5,000; net worth of defendant \$100,000)); damage caused plaintiff; wealth of defendant (*Sweeney v. Meyers*, 199 Minn. 21, 270 N.W. 906, 907 (1937) (\$300 compensatory, \$600 punitive, aff'd; net worth of defendant \$35,000)).

**Mississippi:** Public service nature of plaintiff's suit; wealth of defendant (*Richards v. Allstate Ins.*, 693 F.2d 502, 506 (5th Cir. 1982) (\$2,500 compensatory, \$750,000 punitive reduced by trial court to \$375,000 punitive, aff'd, noting defendant added that year \$390,046,821 to surplus for \$2,371,135,879 in total surplus, and the action will enure to the benefit of all Allstate policyholders in the state)); financial worth of defendant as part of deterrence effect (*Bankers Life v. Crenshaw*, 483 So.2d 254, 278 (1985), aff'd on other grounds, 108 S.Ct. 1645 (1988) (\$20,000 compensatory, \$1,600,000 punitive)).

**Missouri:** Degree of malice, criminality or contumely in defendant's act; age, sex, health and character of the injured party; intelligence, standing and affluence of the tortfeasor (*Hoene v. Associated Dry Goods*, 487 S.W.2d 479, 486 (1972); all the circumstances attendant on the wrongful act; the degree of malice or recklessness; the standing in affluence and influence of the doer of the wrongful act (*State ex rel. Atchison v. Ellison*, 268 Mo. 225, 186 S.W. 1075, 1077 (1916) (\$5 compensatory; \$500 punitive verdict, reduced to \$100 by trial judge, increased to \$500 by appellate court, reduced to \$100 by state Supreme Court)); injury suffered; degree of malice; defendant's intelligence, professional standing, and affluence (*Citizens Bank v. Gehl*, 567 S.W.2d 423, 426 (App. 1978) (\$40,867 compensatory, \$35,000 punitive aff'd, noting \$490,000 net worth)); *Boquist v. Montgomery Ward*, 516 S.W.2d 769 (App. 1974) (\$10,000 compensatory, \$46,000 punitive, aff'd, noting \$724,000,000 net worth)); the injury inflicted; the manner of its infliction (*Beggs v. Universal C.I.T. Corp.*, 409 S.W.2d 719, 724 (1966); the injury inflicted (*Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 586 (8th Cir. 1981) (\$850,000 compensatory, \$3,400,000 punitive; trial court reduced compensatory to \$228,092 but upheld punitive award; appellate court reduced punitive to \$912,368)).

**Montana:** Nature of misconduct; extent and effect of misconduct on plaintiff and others; probability of future reoccurrence of misconduct; relationship between the parties; circumstances surrounding the misconduct; amount of actual damages awarded; wealth of defendant (*Safeco Ins. v. Ellinghouse*, 725 P.2d 217, 227 (1986) (\$25,000 compensatory, \$200,000 emotional distress; \$5,000,000 punitive; punitive reduced on appeal to \$1,000,000)); all attendant circumstances surrounding the wrongful act; wealth and pecuniary ability of defendant (*Johnson v. Horn*, 86 Mont. 314, 283 P. 427, 429 (1929) (\$100 compensatory, \$1,000 punitive)).

**Nebraska:** No punitive damages (*Miller v. Kingsley*, 230 N.W.2d 472, 474 (1975)).

**Nevada:** Degree of culpability and blameworthiness of the defendant; vulnerability and injury suffered by the plaintiff; extent to which the punished conduct offends the public's sense of justice and propriety; the financial ability of the defendant; means which are necessary to deter future misconduct of this kind (*Ace Truck Equip. Rentals v. Kahn*, 746 P.2d 132, 137 (1987) (\$391,049 compensatory; \$500,000 punitive against one defendant (whose net worth is \$1,626,000 before paying the compensatory) and \$300,000 punitive against a second defendant (net worth \$705,700 before paying the compensatory); punitive reduced on appeal to \$250,000 and \$150,000 respectively, upon remeasuring of the factors)).

**New Hampshire:** No punitive damages (*Crowley v. Global Realty, Inc.*, 474 A.2d 1056, 1058 (1984)).

**New Jersey:** Reasonable relation to the actual injury, considered in light of all the factors in each case; the egregiousness of the wrongful conduct; the profitability of the marketing misconduct, where it can be determined; plaintiff's litigation expenses; financial condition of the defendant and the probable effect upon that condition of a particular judgment; the total punishment the defendant will probably



receive from other sources (*Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466, 482 (1986) (\$91,000 compensatory, \$240,000 punitive, aff'd)); nature of wrongdoing; extent of harm inflicted; motive of defendant; wealth of defendant; any mitigating circumstances (*Nappe v. Aschelewitz, Barr*, 97 N.J. 37, 477 A.2d 1224, 1231 (1984) (\$2 compensatory, \$50,000 punitive)).

**New Mexico:** Relation of punitive award to injury and actual damages in light of all circumstances of the case (*Faubion v. Tucker*, 58 N.M. 303, 270 P.2d 713, 716 (1954) (\$100 compensatory, \$1,125 punitive, aff'd); nature of wrong, aggravating or mitigating circumstances, all the circumstances of the case (*Chevez-Rey v. Miller*, 99 N.M. 377, 658 P.2d 452, 454 (1982) (\$1,200 compensatory, \$3,550 punitive, reduced to \$0 on remittitur, remittitur rev'd on appeal and original award reinstated); defendant's wealth (*Aragon v. General Electric Credit Corp.*, 89 N.M. 723, 557 P.2d 572, 575 (1976)).

**New York:** Nature and extent of the malicious or reckless conduct, the degree of culpability and blameworthiness of each defendant; the repetition and continuation of the wrongful conduct; the influence of each defendant and the responsibility which accompanies such influence (*Reynolds v. Pegler*, 123 F.Supp. 36, 39, 41 (S.D.N.Y. 1954) (\$1 nominal compensatory; \$100,000, \$50,000, \$25,000 punitive against each of three defendants)); wealth of defendant (*Chilvers v. New York Mag. Co.*, 153 N.Y.S.2d 153, 154 (Sup.Ct. 1982)); income of defendant (*Diapulse Corp. v. Birtcher Corp.*, 362 F.2d 736, 744 (2d Cir. 1966) (\$50,000 compensatory, \$75,000 punitive)); deliberate continuation of culpable conduct of defendants after knowledge of problem; number of persons affected by wrongful conduct; the expected burden that may be imposed by multiplication of punitive damages (*Doralee Estates v. Cities Service Oil Co.*, 569 F.2d 716, 722 (2d Cir. 1977) (\$60,000 compensatory, \$200,000 punitive)); *Gloria Hall v. Consolidated Edison*, 104 Misc.2d 565, 428

N.Y.S.2d 837 (Sup.Ct. 1980) (\$5,000,000 punitive award reduced to \$50,000); *Keefe v. Gimbel's*, 478 N.Y.S.2d 745, 750 (N.Y.C.Civ.Ct. 1984) (\$100,000 compensatory, \$500,000 punitive reduced to \$75,000 by trial court on ground that that is a sufficient amount to "smart" considering the wealth of the defendant).

**North Carolina:** Financial condition of defendant may be considered (*Arnold v. Sharpe*, 37 N.C.App. 506, 246 S.E.2d 556, 560 (1978); *Hinson v. Dawson*, 92 S.E.2d 393, 397 (1956)).

**North Dakota:** All circumstances of the wrongful act, including the place, character of the persons present, provocation, if any; relative social standing of the parties; wealth of defendant (*Dahlen v. Landis*, 314 N.W.2d 63, 68 (N.D. 1981) (\$20,000 compensatory, \$45,000 punitive); defendant's motive in doing the wrongful act; degree of calculation by defendant; extent of defendant's disregard of rights of others; amount of actual damages (*Smith v. American Family Mut. Ins.*, 294 N.W.2d 751, 766 (1980) (\$7,120 compensatory, \$50,000 punitive)).

**Ohio:** Wealth of defendant may be considered (*Spadafore v. Blue Shield*, 21 Ohio App.3d 486 N.E.2d 1201, 1205 (1985)); all circumstances, including elements of secrecy and vindictiveness (*W.R. Grace & Co. v. Hargadine*, 392 F.2d 9, 16 (6th Cir. 1968)); wealth of defendant (*Shimman v. Frank*, 625 F.2d 80, 101 (6th Cir. 1980) (\$107,873 compensatory, joint and several, against three individual defendants and a labor union; \$75,000 punitive against one reduced to \$20,000 because of \$21,000 net worth; \$75,000 punitive against the second reduced to \$20,000 because of \$23,675 net worth; \$25,000 punitive against the third reduced to \$5,000 because of net worth of "limited means"; \$250,000 punitive against union reduced to \$100,000 because it would probably pay the compensatory)).



**Oklahoma:** Wealth of defendant may be considered (*Fife v. Adair*, 47 P.2d 145, 150 (1935) (\$15,000 compensatory, \$5,000 punitive)); *Southwestern Greyhound v. Rogers*, 267 P.2d 572, 574 (1954) (\$6,950 compensatory, \$4,000 punitive reduced on appeal to \$500)); how much will it take to punish defendant; how much should he be punished under circumstances of the case (*Jones v. Lennington*, 629 P.2d 805, 807 (App. 1981)).

**Oregon:** Wealth of defendant may be considered (*State ex rel. Thesman v. Dooley*, 270 Or. 37, 526 P.2d 563, 567 (1974)); amount of harm by defendant to persons other than the plaintiff; efforts of defendant to neutralize that harm; defendant's good faith and good will towards plaintiff (*Orchard View Farms v. Martin Marietta Aluminum*, 500 F.Supp. 984, 1023 (D.Ore. 1980) (\$103,655 compensatory, \$250,000 punitive reduced to \$200,000 upon remand)).

**Pennsylvania:** Nature of wrongful act; motive of wrongdoer; all attendant circumstances; amount of compensatory award (*Hughes v. Babcock*, 349 Pa. 475, 37 A.2d 551, 554 (1944) (\$2,500 compensatory, \$5,000 punitive reduced to \$1,000 on appeal)); egregiousness of the wrongful act; relative generosity of compensatory award, amount of compensatory award (*Delahanty v. First Pennsylvania Bank*, 318 Pa.Super. 90, 464 A.2d 1243, 1265 (1983) (\$70,000 compensatory, \$750,000 punitive reduced to \$440,000 on appeal)); nature of wrongful act, amount of compensatory award (*Sulecki v. Southeast Nat'l Bank*, 358 Pa.Super. 132, 516 A.2d 1217, 1220 (1986) (\$0 compensatory, \$75,000 punitive, reduced to \$35,000 by trial court)); nature of wrongful act, relationship between the parties, motive of the wrongdoer, all other attendant circumstances (*Feld v. Merriam*, 314 Pa.Super. 414, 461 A.2d 225, 237 (1983), rev'd on other grounds, 506 Pa. 583, 485 A.2d 742 (1984) (\$2,000,000 and \$1,000,000 compensatory to each of two plaintiffs; \$1,500,000 punitive to each; punitive for one plaintiff reduced on appeal to \$750,000 on ground that the larger

amount was disproportionate to the injury)); egregiousness of the wrongful conduct; amount and "generous" nature of compensatory award; whether defendant is covered by insurance and the effect of the punitive award on defendant's insurance rates; wealth of defendant (*Thomas v. E.J. Korvette*, 329 F.Supp. 1163, 1170 (E.D.Pa. 1971), rev'd on other grounds, 476 F.2d 471 (3d Cir. 1973) (\$250,000 compensatory, \$500,000 punitive, reduced by the trial court to \$100,000 compensatory, \$50,000 punitive)); all circumstances of the wrongful act; motives of the wrongdoer; relationship between the parties; amount of compensatory damage (*Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1279 (3d Cir. 1979)).

**Rhode Island:** Wealth of defendant may be considered (*Norel v. Grochowski*, 51, R.I. 376, 155 Atl. 357, 358 (1931)).

**South Carolina:** Nature of the wrongful act; extent of injury caused by wrongful act; matters in aggravation or mitigation; wealth of defendant (*Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258, 262 (1958) (\$5,000 compensatory, \$20,000 punitive); character of the tort committed; ability of the wrongdoer to pay (*Wright v. Charles Pfizer & Co.*, 253 F.Supp. 811, 815 (D.S.C. 1966) (\$150,000 compensatory, \$20,000 punitive)); *Hall v. Walters*, 226 S.C. 430, 85 S.E.2d 729 (1955) (\$1,000 compensatory, \$25,000 punitive); *Eaddy v. Greensboro-Fayetteville Bus Lines*, 191 S.C. 538, 5 S.E.2d 281 (1939) (\$2.50 compensatory, \$1,014 punitive).

**South Dakota:** Nature and enormity of wrongful act; intent of wrongdoer; all circumstances surrounding the wrongful act; amount of compensatory damages; wealth of wrongdoer (*Gross v. Kouf*, 349 N.W.2d 652, 654 (1984)); each case is governed by its own peculiar facts; in this assault case: social standing of the parties; place where assault occurred; character of the persons present; the provocation, if any (*Stene v. Hillgren*, 98 N.W.2d 156, 159 (1959) (\$50 compensatory, \$750 punitive reduced on appeal to \$250)).

**Tennessee:** Nature and character of the wrongful act; all attendant circumstances; degree of malice or wantonness; motive of wrongdoer; manner in which act was committed; injury intended or likely to result from the act; extent and character of the injury; character of the parties; wealth of the defendant (*Suzore v. Rutherford*, 35 Tenn.App. 678, 251 S.W.2d 129, 131 (1952) (\$4,000 compensatory; \$10,000 punitive)); nature of wrongful act, amount of compensatory award; wealth of defendant (*Coppinger Color Lab v. Nixon*, 698 S.W.2d 72, 75 (1985) (\$50,000 compensatory, \$100,000 punitive against one defendant; \$53,000 compensatory, \$450,000 punitive against a second defendant)).

**Texas:** Nature of the wrong; character of the conduct involved; degree of culpability of the wrongdoer; situation and sensibilities of the parties; extent to which the conduct offends a sense of justice (*Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (1981) (\$25,801 compensatory; \$1,000,000 punitive)); same factors (*Crider v. Appelt*, 696 S.W.2d 55, 58 (1985) (\$9,500 compensatory, \$100,000 punitive)); same factors (*K-Mart Corp. v. Trotti*, 677 S.W.2d 632, 640 (1984) (\$8,000 compensatory, \$100,000 punitive)); same factors (*Russell v. Truitt*, 554 S.W.2d 948, 955 (1977) (\$8,000 compensatory, \$55,000 punitive)); degree of outrage produced by the evil; frequency of the evil; amount of compensatory award (*Parker v. McGinnes*, 594 S.W.2d 550, 552 (1980) (\$173 compensatory, \$1,500 punitive)); *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (1986) (\$6,861,663 compensatory, \$100,000,000 punitive; punitive reduced by trial court to \$20,000,000 and by appellate court to \$10,000,000; compensatory reduced by appellate court to \$2,600,000).

**Utah:** Nature of wrongful act; manner and intent with which wrongful act was done; injury inflicted; actual damage suffered (*Powers v. Taylor*, 14 Utah 2d 152, 379 P.2d 380, 383 (1963) (\$1,000 compensatory, \$2,500 punitive)); conduct of the defendant; actual damages (*Holdaway v. Hall*, 29 Utah 2d 77, 505 P.2d 295, 296 (1973) (\$10,683 compensatory, \$5,000

punitive)); wealth of defendant may be considered (*Wilson v. Oldroyd*, 1 Utah 2d 362, 267 P.2d 759, 766 (1954) (\$50,000 compensatory, \$25,000 punitive reduced to \$5,000)).

**Vermont:** Circumstances of wrongful act; indignity to the plaintiff; that trespass occurred at night; situation of plaintiff's family; degree of fault or malice (*Ellsworth v. Potter*, 41 Vt. 685, 686 (1869)); wealth of defendant may be considered (*Woodhouse v. Woodhouse*, 99 Vt. 91, 130 Atl. 758, 781 (1925)); wealth of defendant (*Parker v. Hoefer*, 118 Vt. 1, 100 A.2d 434, 447 (1953)); *Lanfranconi v. Tidewater Oil Co.*, 376 F.2d 91, 96 (2d Cir. 1966) (\$20,000 compensatory, \$35,000 punitive reduced to \$5,000 punitive because the conduct was not so wrongful and the malice not sufficiently grievous to warrant the larger award)).

**Virginia:** Damage sustained (*Gazette, Inc. v. Harris*, 229 Va. 1, 325 S.E.2d 713, 747 (1985) (\$100,000 compensatory, \$250,000 punitive reversed as excessive in this case); wealth of defendant; it may be considered (*Derring's Adm'r v. Virginia Ry & Power Co.*, 122 Va. 517, 95 S.E. 405, 409 (1918)); wealth of defendant may be considered (*Sperry Rand Corp. v. A-T-O, Inc.*, 447 F.2d 1387, 1394 (4th Cir. 1971) (\$231,012 compensatory, \$175,000 punitive against corporate defendant and its president, \$10,000 against an employee of the corporation, upheld on appeal)).

**Washington:** Punitive damages not permitted except as expressly provided by statute. *Boeing Co. v. Sierracin Corp.*, 108 Wash.2d 38, 738 P.2d 665 (1987).

**West Virginia:** Fact setting of the wrongful act; culpability of the wrongful act; amount of compensatory damages; motives behind defendant's conduct; degree of calculation; extent of defendant's disregard of rights of others; character of the parties; standing of the parties in society (*Leach v. Biscayne Oil & Gas*, 169 W.Va. 624, 289 S.E.2d 197, 199 (1982) (\$8,200 compensatory; \$41,800 punitive)); the actual

damage sustained; character, wealth, standing in the community, social position of defendant (*Hess v. Marinari*, 81 W.Va. 500, 94 S.E. 968, 971 (1918)).

**Wisconsin:** Grievousness of the wrongful act; degree of malicious intent; potential damage which might have been done by defendant's act; actual damage caused by defendant; defendant's ability to pay (*Brown v. Maxey*, 124 Wisc.2d 426, 369 N.W.2d 677, 684 (1985) (\$52,185 compensatory, \$200,000 punitive; punitive vacated by court of appeals, reinstated by state supreme court)); character and extent of wrongful act; probably motive of defendant; wealth of defendant (*Jones v. Fisher*, 42 Wisc.2d 209; 166 N.W.2d 175, 181 (1969)); compensatory damages; analogous criminal fines; grievousness of the act; degree of malicious intent; potential damage which might have been caused; actual damages; defendant's ability to pay (*Fahrenberg v. Tengel*, 96 Wisc.2d 211, 291 N.W.2d 516, 527 (1980)).

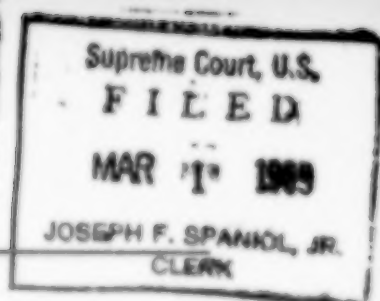
**Wyoming:** Nature of the tortious act; amount of actual damages; wealth of defendant (*Sears v. Summit, Inc.*, 616 P.2d 765, 772 (1980) (\$2,941 compensatory, \$4,000 punitive)); wealth of defendant may be considered (*Campen v. Stone*, 635 P.2d 1121, 1132 (1981) (\$55,703 compensatory, joint and several, against two defendants; \$120,000 punitive against one defendant, \$3,000 against the other)); *Town of Jackson v. Shaw*, 569 P.2d 1246, 1255 (1977) (\$5,000 compensatory, \$10,000 punitive reduced by appellate court to \$8,000)).



**AMICUS CURIAE**

**BRIEF**

No. 88-556



IN THE  
UNITED STATES SUPREME COURT

OCTOBER TERM 1988

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BROWNING-FERRIS INDUSTRIES OF VERMONT,  
INC. and BROWNING-FERRIS INDUSTRIES, INC.

Petitioners,

v.

KELCO DISPOSAL, INC. and JOSEPH KELLEY,

Respondents.

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On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

AMICUS BRIEF FOR THE  
ILLINOIS TRIAL LAWYERS ASSOCIATION  
IN SUPPORT OF THE  
RESPONDENT KELCO DISPOSAL, INC.

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## SUMMARY OF ARGUMENT

Punitive damage awards serve an admirable purpose in the social structure of American society. By punishing fraud, gross negligence, and willful and wanton behavior, punitive damages promote good faith bargaining and responsible decision making. Nonetheless, punitive awards are subject to much debate. Opponents of the punitive awards charge that the awards are unfair and inefficient. These assertions, however, are not supported by fact. The empirical findings of the Institute for Civil Justice<sup>1</sup> and the American Bar Association<sup>2</sup> demonstrate that punitive

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<sup>1</sup> PETERSON, SARMA, and SHANLEY, Punitive Damages: Empirical Findings, Rand, The Institute for Civil Justice (1987).

<sup>2</sup> DANIELS, Punitive Damages: The Real Story, American Bar Association Journal, August 1, 1986, vol. 72 pp. 60-63.

awards have remained stable and modest over the last quarter of a century

### ARGUMENT

Various lobbying and special interest groups have embarked on a crusade to prejudice the American public against punitive awards. However, punitive awards serve an admirable purpose in the social structure of America. Moreover, empirical evidence demonstrates that punitive awards are fair and efficient.

#### I. PUNITIVE AWARDS ARE JUST

Punitive awards are an efficient method of preventing corporations, municipalities, and individuals from injuring citizens as a result of egregious acts. Punitive awards are employed in



only limited situations and when employed the awards act as a deterrent.

A. PUNITIVE AWARDS ARE LIMITED

Punitive awards are available only in the most extreme circumstances. The awards are subject to a variety of safeguards at the trial level. The question of whether the facts of a particular case demonstrate egregious conduct is a question of law. Typically, only where the court rules that a defendant has committed a tort with fraud, actual malice, or deliberate violence will the jury be allowed to consider the question of punitive damages<sup>3</sup>. Moreover, in many instances, a jury rejects a party's request for a punitive award. Finally, if a jury grants a punitive award, the award is subject to reduction

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<sup>3</sup> Kelsay v. Motorola, Inc., 74 Ill.2d 172, 384 N.E.2d 353 (1979).

through post trial action.

B. PUNITIVE AWARDS ARE A DETERRENT TO  
EGREGIOUS CONDUCT

Any tolerance of willful, unscrupulous or outrageous conduct should not be sanctioned, but should be deterred. The availability of punitive awards is a financial deterrent. Punitive awards appropriately counteract the avarice of those few who will deliberately break acceptable mores of society for their own financial gain.

Punitive awards appropriately distinguish between the intentional wrongdoing and the merely inadvertent act. Without punitive damages as a bulwark against the occasional outrageous and deliberate action, such conduct will be unchecked.

II. PUNITIVE AWARDS ARE FAIR AND  
EFFICIENT

Opponents of punitive awards charge that the awards are unfair and inefficient. These assertions, however, are erroneous.

A. PUNITIVE AWARDS ARE MODEST

From 1981 through 1983 in Cook County, Illinois, the median punitive award was \$14,000<sup>4</sup>. Moreover, in only 2.2% of the jury verdicts in which the plaintiff received compensation did the plaintiff also receive a punitive award<sup>5</sup>. In New York City from 1981 through 1983 the median punitive award was \$25,000<sup>6</sup> and in only 1.6% of the jury verdicts in which the plaintiff received compensation did the plaintiff also receive a punitive

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<sup>4</sup> DANIELS, Punitive Damages: The Real Story, p. 63

<sup>5</sup> Id. at 62

<sup>6</sup> Id. at 63



award.<sup>7</sup> As demonstrated by empirical evidence, the size of punitive awards is modest. Modest awards cannot be unfair.

Opponents of punitive awards cite to the average punitive award rather than the median award in order to support their contention that punitive awards have increased substantially. The use of the average award is misleading. The average punitive award has increased primarily due to a few very large awards.<sup>8</sup> These very large awards, however, are consistently reduced by post trial actions, whether by settlements, remittitur, or appellate court decisions.<sup>9</sup> In fact, post trial actions have reduced the jury awards by

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<sup>7</sup> Id. at 62

<sup>8</sup> DANIELS, Punitive Damages, American Bar Association Journal, April 1, 1986, vol. 72 p. 21.

<sup>9</sup> PETERSON, SARMA, and SHANLEY, Punitive Damages: Empirical Findings, pp. 26-30.

50%.<sup>10</sup>

B. PUNITIVE AWARDS ARE STABLE

Although the frequency of punitive awards has increased over time, this phenomenon is due to the increase in corporate contract actions in which bad faith is alleged.<sup>11</sup> In an era of deregulation, such an increase must be expected. The federal government no longer is the watchdog of corporate business actions. The market cannot sufficiently deter all bad faith conduct. In order to monitor its own actions and check any market aberration, corporate business has needed increased access to the courts. Punitive awards are necessary in order for the judicial system to fulfill its economic role.

The source of the controversy over

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<sup>10</sup> Id.

<sup>11</sup> Id. at 8-11, 22-24

punitive awards rests in personal injury cases. However, the incidence of punitive awards in personal injury cases has been quite small. In Cook County, on average, plaintiffs recovered less than three awards per year from 1960 to 1984.<sup>12</sup> During the same period of time, plaintiffs in San Francisco County received less than one award per year.<sup>13</sup> Moreover, the ratio of punitive awards to compensatory awards was rarely more than 2:1, a ratio smaller than in contract and intentional tort cases.<sup>14</sup> In short, the controversy over punitive awards in personal injury cases is a fabrication.

Civil rights actions and other intentional tort cases are the primary

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<sup>12</sup> Id. at 9-14

<sup>13</sup> Id.

<sup>14</sup> Id. 40-42



sources of punitive awards.<sup>15</sup> Punitive damages were awarded in 40% of such cases when the plaintiff received a compensatory award.<sup>16</sup> The punitive awards, however, were relatively small and constant. The medians of the awards remained under \$25,000 during the 25 year period of 1960 through 1984.<sup>17</sup>

As demonstrated by empirical evidence, the frequency of punitive awards is stable. A stable award cannot impair the efficiency of economic decision making.

C. ANY REGULATION OF PUNITIVE AWARDS  
MUST BE LEFT TO THE STATES

State legislatures are competent to regulate punitive awards. In 1986 alone, nine states took affirmative steps to

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<sup>15</sup> Id. at 10-11

<sup>16</sup> Id. at 45-47

<sup>17</sup> Id. at 24-26

regulate punitive damages.<sup>18</sup> New Hampshire abolished punitive damages.<sup>19</sup> Oklahoma and Colorado limited the amount of the punitive award to the amount of the compensatory award; while Florida limited the punitive amount to three times compensation.<sup>20</sup> Illinois and Minnesota barred parties from requesting punitive awards in their complaint, allowing a request for punitive awards only through subsequent motion.<sup>21</sup> Alaska, Colorado, Illinois, Iowa, and South Dakota all limited the scope of punitive awards.<sup>22</sup> Colorado and Florida required a portion of the punitive award to be distributed to

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<sup>18</sup> Id. at 13

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Id.

public funds.<sup>23</sup> Illinois permitted judicial discretion in distributing the punitive award to public funds.<sup>24</sup> As shown, state legislatures have reasonably tailored punitive awards. Therefore, a national standard for punitive damages, whether enacted by Congress or established by the federal judiciary, would be inappropriate.

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<sup>23</sup> Id.

<sup>24</sup> Id.



## CONCLUSION

In sum, punitive awards have remained stable and modest. A stable and modest award cannot impair economic decision making and cannot be unfair. The controversy over the reasonableness of punitive damages is without merit. The fact that the opponents of punitive damages are concerned with the awards demonstrates that punitive awards are a deterrent to egregious behavior.

Respectfully submitted,

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